United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7513

In The

United States Court of Appeals

For The Second Circuit

WEST & COMPANY, INC.,
Plaintiff-Appellant-Appellee,

vs.

ARICA INSTITUTE, INC.,
Defendant-Appellee-Appellant,

vs.

WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MacDONALD-WINCHESTER PUBLISHERS, and JONATHAN ADVERTISING, INC.,
Counterclaim Defendants-Appellants-Appellees

UNITED STATES COURT OF APPEALS
FILED
DEC 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX

Volume I, pp. 1a - 216a

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75 Civ. 5771 WEST & CO. VS ARICA INSTITUTE STEWART,J.

TE	NR.	PROCEEDINGS
18-75	1	Filed petition fore removal from the Supreme Court, State of NY, County of NY
18-75	2	Filed bond #85203 for undertaking of removal in the amt. of $500.00 by the United States Fidility and Guaranty Co.
9-75	3	Filed Order that Stanley A. Bowker is appointed a special process server m/n
9-75	4	Filed deft. Arica affdvt. in support of application for a preliminary injunction
9-75	5	Filed deft. Aricia's briedt in support of preliminary relief
9-75	-6-	Filed affdvt. of process serve Stanley A. Bowker that he served summons, answer and counterclaim and memorandum of law and affdvts upon upon pltf. and West & Co. Michael C. Duban on 11-19-75 Zim and Kane on 11-19-75 Steven West on 11-19-75
-75	-7-	Filed affdvt. of service by John J, Caslin Jr. of pepition for removal and exhabits A and B removal bond upon Michael C. Duban on 11-18-75
9=75	=8=	Filed ANSWER and counterclaim of deft. Arica Institute, Inc.-summons iss. KIKSA
9-75	-9-	Filed deft Arica Institute, Inc. notice of motion for a preliminary injunction ret. 12-5-75
-75	-10-	Filed affdvt. of Neal Watstein in re. to work of pltf.
4-75	-11-	Filed affdvt. of John Finnell dated 12-2-75 in re. to work of pltf.
75	-12-	Filed affdvt. Steven West in support of motion
-75	-13-	Filed affdvt. of Michael C. Duban in support of motion
-75	-14-	Filed pltf. Bried in opposition
-75	-15-	Filed ANSWER to counter claim of defts West & Co., Inc. et. al. MCD
-75	-16-	Filed affdvt. of George J. Goodman in support of motion for preliminary injunction
-75	-17-	Filed MEMORANDUM # 43525 Arica's motion for a preliminary injunctinn is denied So Ordered--Gagliardi, J. m/n
-75	-18	Filed counterclaim defts West & Co, Inc. et al cross-notice of taking deposition of pltf Arica Institute, Inc. on 1-29-76.
2-75	19	Filed deft. Arica Institute Inc. notice of taking deposition and document demand on 1-29-76
-76	20	Filed stip. and order adj deft. Arica notice of deposition and document demand to sine die--Gagliardi, J.
-76	21	Filed deft-counterclaim pltf. exhibit A, affdvt, memorandum and notice of motion for an order entering default judgment pursuant to rule 55(b) ret.4-1-76
76	22	Filed memo. end. on document # 21 Motion for entry of default judgment denied. Jonathan Advertising, Inc. is directed to enter an answer within 10 days of filing of this endorsement. ---Stewart, J. m/n
76	23	Filed ANSWER to counterclaim of deft. Jonathan Advertising, Inc. MCD
-76	24	Filed transcript of record of proceeding dated 12-4-75.
7-76		Pre-trial conferance held. STEWART,J.
76	25	Filed pltfs. and counterclaim defts. pre trial memorandum.
-76	26	Filed deft. Arica's pre-trial brief
-76	27	Filed deft. Arica's reply to West's pre-trial memorandum
-76	---	Pre-trial conference held and continued
76	---	Non-Jury trial begun before Judge Stewart
76		Trial continued
76		Trial continued and concluded Judge's decision Res.
76	-28-	Filed deft. Arica's proposed findings of fact
76	-29-	Filed deft Arica's trial exhibits
76	-30-	Filed deft. Arica's post-trial brief
-76	-31-	Filed OPINION # 45043 Arica removed this action to the Dist Court. Arica sought to preliminarily enjoin West from distrubuting its recently published book

OPINION CONTINUED ON PAGE-2-

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110 Rev. Civil Docket Continuation

ATE	PROCEEDINGS	Date Order or Judgment Noted
	Arica also seeks an award of atty's fees and cost. We decline to grant Arica's request for atty's fees. Turning to West's claims having found that his use of psycho-calisthenics infringes upon Arica's right to the mark, we deny his request for injunctive relief and dismiss his complaint. Costs are are awarded to Arica. Settle order on 10 days notice in conformity with rule 65 (d) --Stewart, J. m/m/	
0-76	-33- Filed MEMORANDUM # 45119 amending Opinion on page 1. Michael Duban. Esq. should also be lsited as Atty's for Jonathan Advertising, Inc. and on page 8, line 4 the word registered should be replaced by applied to register--Stewa t, J. m/n	
76	-33- ORDER dismissing the complaint without costs to either party--Stewart, J m/n	
1-76	-34- Filed deft's memorandum in opposition to pltf's proposed order and in support of Arica's order --Stewart, J. Judgment entered on 10-13-76-clerk	
04-76	-35- Filed notice of entry of order filed 9-29-76.	
04-76	-36- Filed ORDER Amending the Order of 9-29-76 to award costs to Arica s per the Sept. 1, 1976 Opinion of this court---Stewart, J. m/n	
8-76	-37- Filed pltf. and West & Co., Inc., S. West, Steven West d/b/a MacDonald-Winchester Publishers and Jonathan Advertising, Inc. Counterclaim defts affdvt. and notice of motion for a stay pending appeal ret. 10-21-76.	
3-76	-38- Filed pltf. notice of appeal to the U.S.C.A from the order of 9-29-76 for the Second Circuit (counter claimm defts) mailed copy to Michael Duban, Kane, Dalsimer, Kane, Sullivan & Kurucz, Mc Donnel-Winchester Publishers	
8-76	-39- Filed bill of cost docket as judgment #76,916 taxed in the sum of $2,582.62	
4-76	-40- endorsed on deposit of security filed 10-14-76..memo. of deposit of $250.00 check in lieu of bond on appeal from Michael C. Duban	
0-76	-41- Filed affdvt. of Alvin Reuban in opposition to pltf's motion for stay pending appeal	
0-76	-42- Filed deft's memorandum in opposition to stay pending appeal	
-76	-43- Filed affdvt. of service of deft's memorandum in opposition to a stay pending appeal and the supporting affdvt of Alvin Reuben on atty for he pltf. on 10 -20-76	
2-76	--- Filed memo. end. on document # 37 Pltf. moved for an order staying the permanent injunction. motion denied---Stewart, J. m/n	
6-76	-44- Filed deft. Arica Institute, Inc. notice of appeal to the U.S.C.A for the Second Circuit from the final judgment entered on 10-13-76. Mailed copy to Michael C. Duban, Mc Donnell -Winchester Publishers	
09-76	-45- Filed notice of original record on appeal has been certified and transmitted to the U.S.C.A for the Second Circuit on 11-9-76	
7-76	46 Filed deft. Arica Institute, Inc. affdvt. and order to show cause and motion Ordered that counterclaim defts show cause why motion to punish for contempt should not be granted. ret. 11-18-76 at 4:30 in Rm 301 service to rendered on or before 11-17-76---S tewart, J.	
18-76	-47- Filed pltf's affdvt. in opposition to the relief requested in the Order to Show Cause	
	Hearing on Comtempt motion held, before Judge Stewart	

ST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	H	23	$	OTHER	NUMBER	DEM.	YR.	NUMBER
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3a

PLAINTIFFS

WEST & CO.,INC.

DEFENDANTS STEWART,J.

ARICA INSTITUTE,INC.

CAUSE

petition for removal from State Court; service mark trademark infringement(issued State trademark #)

s ls

ATTORNEYS

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Kane, Dalsimer,Kane,Sullivan & Kurucz
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☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

DATE NOV 18 1975

RECEIPT NUMBER 612-64

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED

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JS-6 09-76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

WEST & COMPANY, INC.,

Plaintiff,

-against-

ARICA INSTITUTE, INC.,

Defendant,

-against-

WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MacDONALD-WINCHESTER PUBLISHERS, and JONATHAN ADVERTISING, INC.,

Counterclaim Defendants.

- x

75 Civil 5771

ORDER

This cause came on for trial before this Court on June 9, 10 and 14, 1976 and pre-trial briefs and post-trial briefs having been filed by all of the parties, and proposed Findings of Fact and Conclusions of Law having been submitted by all parties, and the Court having written an Opinion including findings of fact and conclusions of law, filed September 7, 1976,

I. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that effective forty (40) days from the date hereof, counterclaim-defendants, West & Company, Inc., Steven West, Steven West d/b/a MacDonald-Winchester Publishers, and Jonathan Advertising, Inc., their agents, officers, servants, employees, attorneys

and all persons in active concert with them or any of them who receive actual notice of this Order by personal service or otherwise are hereby:

A. Forever enjoined and restrained from using the word "psycho-calisthenics" in the promotion or advertising of their services and/or products.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that effective fifteen (15) days from the date hereof, counterclaim-defendants, West & Company, Inc., Steven West, Steven West d/b/a MacDonald-Winchester Publishers, and Jonathan Advertising, Inc., their agents, officers, servants, employees, attorneys and all persons in active concert with them or any of them who receive actual notice of this Order by personal service or otherwise are hereby:

A. ORDERED to cease distributing any books, literature, tape cassettes or other materials containing the word "psycho-calisthenics."

B. ORDERED to commence withdrawal from the market-place of all books or other material in circulation but not yet purchased in which the word "psycho-calisthenics" appears and to advise distributors of unsold copies of this Court's Order by means of a letter in the form annexed hereto as Exhibit 1. Said withdrawal shall be completed within forty (40) days of the date of this Order.

C. ORDERED, for a period of six months after entry of judgment, to segregate all orders, bills and other sales and shipment records for books and materials in which the word "psycho-calisthenics" appears and to maintain all documents, including but not limited to letters, records, shipping and production memoranda relating thereto.

D. ORDERED to make copies of and preserve for a period of six months from the date of entry of this judgment, all orders for books and other materials in which the word "psycho-calisthenics" appears which are now on hand or which are subsequently received, and to return said orders to the respective customers, together with a letter in the form annexed hereto as Exhibit 2.

E. ORDERED to make available the orders, letters and other documents referred to in paragraphs B through D, supra, for inspection by defendant's attorneys, during the six-month period immediately following the entry of this judgment.

III. IT IS FURTHER ORDERED that within forty (40) days from the date hereof, counterclaim-defendants West & Company, Inc., Steven West, Steven West d/b/a MacDonald-Winchester Publishers, and Jonathan Advertising, Inc., their agents, officers, servants, employees, attorneys and all persons in active concert with them or any of them who receive actual

notice of this Order by personal service or otherwise are hereby:

A. ORDERED to deliver up for destruction any and all labels, packages, cartons, display pieces, wrappers, advertising material, letters, billheads and all other printed or recorded matter of any nature whatsoever containing the word "psycho-calisthenics."

B. ORDERED to file with the Court and serve on the defendant Arica a report in writing under oath, setting forth in detail the manner and form in which the said counterclaim-defendants have complied with the injunction, including but not limited to:

1. A statement identifying all customers contacted regarding withdrawal of all books or materials in circulation but not yet purchased, date of contact, identity of individuals contacted and nature and quantities of infringing materials returned by customers.

IV. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Complaint be and the same is hereby dismissed without costs to either party.

United States District Judge

DATED: New York, N.Y.
September 27, 1976.

OPINION OF JUDGE STEWART DATED SEPTEMBER 7, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

WEST & COMPANY, INC.,

Plaintiff,

-against-

ARICA INSTITUTE, INC.,

Defendant,

-against-

WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MacDONALD-WINCHESTER PUBLISHER , and JONATHAN ADVERTISING, INC.,

Counterclaim Defendants.

- - - - - - - - - - - - - - - - - - - -x

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VIRGINIA R. RICHARD

Of Counsel

O P I N I O N

STEWART, DISTRICT JUDGE:

Plaintiff, West & Company, Inc., filed suit against defendant, Arica Institute, Inc. ["Arica"] in New York State Supreme Court, alleging that Arica had misappropriated West's service mark "psycho-calisthenics" and was liable for unfair competition.[1/] Arica removed the action to federal court, invoking this court's original jurisdiction pursuant to 15 U.S.C. § 1121 and § 1125(a)[2/] [the "Lanham Trade-Mark Act"].

1/ West registered psycho-calisthenics as a service mark in New York in November of 1974. A service mark, similar to a trademark, is used "in the sale or advertising of services to identify the services of one person and distinguish them from the services of others." 15 U.S.C. § 1127. A service mark, like a trademark, is used to indicate the origin of services and goods, to guarantee the quality of such items, and to advertise and sell the services or products through the appeal of the mark.

2/ 15 U.S.C. § 1125(a) provides in pertinent part:

> "Any person who shall affix, apply, or annex, or use in connection with any goods. . ., or any container or containers for goods, a false designation or origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods. . .to enter into commerce, . . .shall be liable to a civil action. . .by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

In addition, Arica brought a counterclaim against West & Company, Inc., Steven West, Steven West d/b/a MacDonald-Winchester Publishers, and Jonathan Advertising, Inc., [collectively referred to hereafter as "West"], alleging that Arica had a proprietary right to use "psychocalisthenics" 3/ as its service mark and that West's use of the term violated 15 U.S.C. § 1125(a).

In November of 1975, Arica sought to preliminarily enjoin West from distributing its recently published book entitled Psycho-Calisthenics and from using "psycho-calisthenics" in any other manner. After a brief evidentiary hearing in December of 1975, the motion was denied. At that time, the court concluded that Arica had failed to demonstrate that psychocalisthenics was a service mark indicating origin; rather, the record indicated that psychocalisthenics was a descriptive term. Further, the evidence presented was insufficient to establish that physchocalisthenics had developed a secondary meaning which resulted in the public making an association between the term and Arica Institute.

3/ West hyphenates psycho-calisthenics while Arica spells it as one word.

A trial of the merits of the action was held in June of 1976. On the basis of several days of testimony and the numerous evidentiary exhibits, we make the following findings of fact.

In the summer of 1972, Steven West, who had become involved with the field of humanistic psychology, decided to name the series of mental exercises which he had been developing "psycho-calisthenics." [Trial Transcript, pp. 48-49]. [4/] He used the word, which he believes he coined, in meetings attended by a few friends during the course of that summer. [Tr., pp. 13-14, 23-24, 50-52] In November of 1974, when West decided to entitle the book he had been writing Psycho-Calisthenics, he sought to protect his use of the term. [Tr., pp. 50-52]. Claiming a first use of October, 1974, West obtained a New York State service mark in November of 1974. [Defendant's Ex. A]. West's application for United States trademark registration was rejected in August of 1975; the examiner found that the label was "merely descriptive"

4/ References to the trial transcript will be abbreviated "Tr.".

and the specimens of use submitted in support of the application were unacceptable. [Defendant's Ex. B, Tr., pp. 86-92]. West has not pursued the application further. [Tr., pp. 92-94].

Between West's first casual, oral use of psycho-calisthenics and the time when he applied for state and federal registration, he did not distribute literature, advertise, or publicly display the term psycho-calisthenics as the title for the system of exercises which he had developed.[5/] He did use the word on typed drafts of his book. [Tr., pp. 88-90].

Since October of 1975, when West began advertising his book, he has used the word "psycho-calisthenics" extensively. In addition to book ads., West has made three cassette programs for persons troubled by their weight, smoking habits, and sexuality, and he has used psycho-calisthenics as a label on their covers and for their promotion. [Tr., pp. 96-101, Defendant's Ex. C, D, E, F]. In using the word psycho-calisthenics, West's advertisements and book jacket contain the symbol P,

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5/ In July of 1975, when seeking money to finance the book's publication, West did place a newspaper advertisement which included the word psycho-calisthenics. [Tr., p. 106].

which is the federal trademark registration symbol. 15 U.S.C. § 1111. [Defendant's Ex. E, F, EE, DD].[6/] West who is distributing his book by mail, has placed 50,000 copies in circulation.

Arica is a non-profit institute which was incorporated in 1971. A year earlier, a group of North Americans had gone to South America to study a system for personal development under Oscar Ichazo. [Tr., pp. 127-128, 141]. Upon their return, they founded Arica, the purpose of which was "to introduce into our contemporary American culture an integrated system of personal development centered at the physical, emotional, mental and spiritual levels with the aim of developing totally integrated, rounded human beings." [Tr., p. 129].

Arica created training courses, taking from three hours to three months [Tr., pp. 135, 146, 153], and the established centers or "houses" in cities in the United States and in Europe. [Tr., pp. 153-154]. Arica has presented its courses at other institutes and conferences [Tr., pp. 136, 173, 274-275, Defendant's Ex. BB, CC], given demonstrations in hospitals, schools, and prisons, [Tr., pp. 149, 274-278, Defendant's Ex. N], and received media coverage of its work. [Tr., pp. 128-129, Defendant's Ex. I, L]. According to one of Arica's

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6 / At trial, West stated that he had instructed his employees to remove the symbol from future literature. [Tr., p.105]. However, newspaper advertisements of June 22 and 29, 1976, annexed as Ex. A to Arica's post-trial brief, indicate that the symbol is still being used.

executives, some 4,000 persons have participated in its 40-day training programs and some 50,000 persons have attended its demonstrations and other courses. [Tr., pp. 157-160].

One of the techniques used by Arica in all of its courses is a series of physical exercises. These exercises are described as related to yoga exercises but are distinct in that Arica's exercises require continual motion. [Tr., p. 191]. An Arica brochure characterized the movements as "a combination of various yoga systems, dance and calisthenics." [Tr., p. 205, Defendant's Ex. P]. One Arica trainer explained that "psychocalisthenics is a combination of movements coordinated with breathing that produces specific physical results that then generates [sic] specific intellectual and emotional results." [Tr., p. 280].7/

When Arica first gave training in these exercises, it denominated the activity as "gym." [Tr., pp. 137, 144, 240]. In June of 1973, it changed the title to "psychocalisthenics" [Tr., pp. 134, 160].8/ Arica circulated notice of the name

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7/ A research proposal to study the effects of psychocalisthenics on different groups has recently been accepted by the National Institute of Mental Health. [Tr., pp. 290-292, Defendant's Ex. GG]. The research team will be headed by a former research director of Arica.

8/ The source of psychocalisthenics in Arica's terminology remains unknown. Those familiar with the Institute assume that the word originated with Ichazo, who used many invented words. [Tr., pp. 188, 210, 234, 237-238].

change in its newsletter, the Arica Chronicle. [Tr., p. 161, Ex. M]. Other news coverage, when discussing Arica's activities, also refer to the exercise program as psychocalisthenics. [Defendant's Ex. L]. Arica has used the term psychocalisthenics continually since June of 1973; the word appears on Arica's brochures and advertisements, [Defendant's Ex. P, U, X, Y, Z, AA], posters [Defendant's Ex. K], and as the title of its cable television show [Tr., pp. 211-214, Defendant's Ex. Q, R]. Psychocalisthenics will also appear in the title of a book about Arica which Simon & Schuster will publish this fall. [Plaintiff's Ex. 4].

Arica has spent some $300,000 since 1973 promoting its activities. [Tr., p. 221]. It has also evidenced concern for its name and reputation; administrators of Arica ask those who learn of unauthorized individuals holding themselves out as capable of teaching the Arica methods to inform Arica's central office. [Tr., pp. 221-222, Defendant's Ex. M, W]. Further, in November of 1975, when Arica learned of West's use of psycho-calisthenics, it sent West a notice of infringement. [Tr., p. 106]. Finally, Arica has registered psychocalisthenics with the United States Patent and Trademark Office; on July 6, 1976, that office indicated initial acceptance of the mark and published its decision in the Official

Gazette. [Defendant's Ex. V].[9/]

These findings of fact lead us to reaffirm the holding of the preliminary injunction hearing that psychocalisthenics is a descriptive word, which could be used to refer to either physical or mental exercises which are intended to effect mental processes. However, as noted in that opinion, a descriptive word may function as a service mark if it has developed a secondary meaning. Miss Universe, Inc. v. Patricelli, 408 F.2d 506, 509 (2d Cir. 1969). Secondary meaning is established if it is shown that the public has come to associate a particular word with a particular source. Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2d Cir. 1962). Here, we conclude that, despite the relatively short time span in which Arica has been publicly using the term psychocalisthenics, Arica's continual and extensive publication of the

9/ The Patent Office initially rejected Arica's application to register psychocalisthenics without proof of secondary meaning. After amendment of its application, Arica received notification of Patent Office acceptance of the mark without further proof. West's attorney has indicated that West intends to oppose registration. See 15 U.S.C. § 1063. [Tr., p. 6]. Under these circumstances, we do not believe that the action of the Patent Office establishes a rebuttable presumption upon which Arica can rely that the word psychocalisthenics is "suggestive or arbitrary or fanciful rather than merely descriptive." Abercrombie & Fitch Co. v. Hunting World, Inc., slip op. 1565, 1575 [2d Cir. Jan. 16, 1976).

word has been sufficient to establish secondary meaning, and psychocalisthenics is thus a valid mark.[10/] Psychocalisthenics has been given prominent display in literature by and about Arica. It is a word used by Arica teachers in all their demonstrations. A cable television show which ran in the New York area for six months consisted of psychocalisthenic exercises denominated as such. Those knowledgeable in the field of humanistic psychology have testified that they associate the word psychocalisthenics with Arica Institute.[11/]

10/ "Even assuming secondary meaning had not yet come to full fruition, '[a] mark with secondary meaning in the making should also be protected, at least against those who appropriate it with knowledge or good reason to know of its potential in that regard, or with an intent to capitalize on its quality.'" National Lampoon, Inc. v. American Broadcasting Companies, Inc., 376 F. Supp. 733, 747 (S.D.N.Y. 1974), [citing 3 Callman, Unfair Competition Trademarks and Monopolies, (3d ed. 1971) p. 356], aff'd, 497 F.2d 1343 (2d Cir. 1974).

Here, the evidence has established that Steven West attended an Arica demonstration in the spring of 1975 and thus had reason to know that Arica used the term psychocalisthenics. Further, West was served with a notice of infringement in November of 1975, and, despite his involvement in this litigation from that month on, he continued to use the term psycho-calisthenics and to display a federal registration symbol adjacent to it.

11/ Tr., pp. 177-178, 189, 196, 312-313.

Arica has also established that its public use of psychocalisthenics was not only greatly in excess of Steven West's use of the term[12] but also predated West's use by two years. Further, Arica has demonstrated that it attempted to maintain exclusive use of the term by filing a notice of infringement on West and by supervising those who conducted Arica courses.[13] Consequently, as Arica is the user which first appropriated the mark, it has obtained an enforceable right to exclude others from using it because it has demonstrated that its initial appropriation was accompanied by an intention to continue to exploit the mark commercially.[14] La Societe Anonyme des Parfums

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12/ West's earlier, informal oral use of the word psychocalisthenics does not constitute the open and public usage for which protection is afforded.

13/ There had been some suggestion at the hearing on the preliminary injunction that Esalen Institute, an organization in the same field as, but unrelated to Arica, had used the term psychocalisthenics in one of its brochures. However, Arica established at the trial that its staff members had conducted programs at Esalen and that Esalen used the word psychocalisthenics in relation to Arica's presentations. [Tr., pp. 135-137]. There was no other evidence of third party usage of the word psychocalisthenics.

14/ A user of a mark is entitled to the protection of 15 U.S.C. § 1125(a) whether or not the mark is registered with the United States Patent and Trademark Office. 15 U.S.C. § 1127; see also Mortellito v. Nina of California, Inc., 335 F. Supp. 1288, 1295 (S.D.N.Y. 1972).

LeCalion v. Jean Patou, Inc., 495 F.2d 1265, 1271 (2d Cir. 1974).

We turn now to the question of whether West's use of the word psycho-calisthenics is likely to cause confusion and thus constitutes infringement of Arica's mark. See Miss Universe, supra, 408 F.2d at 509. We find that Arica has established both the fact of confusion and that a substantial likelihood of further confusion exists. Syntex Laboratories, Inc. v. Norwich Pharmacal Co., 437 F.2d 566 (2d Cir. 1971). First, when those familiar with Arica were presented with West's book Psycho-Calisthenics, they presumed that the book had some connection with Arica Institute.[15] Second, those knowledgeable in book marketing have testified that the existence of two books on the market, both of which contain the word psycho-

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15/ Tr., pp. 177-178, 189, 196, 312-313. This mental confusion could have the effect of bestowing upon West's book the reputation and good will of the programs developed by Arica. The fact that, upon perusal, potential purchasers could distinguish West's work from Arica's is irrelevant. See Grotrian, Helfferich, Schulz, Th. Stewinweg Nachf. v. Steinway & Sons, 365 F. Supp. 707, 716 (S.D.N.Y. 1973), aff'd as modified, 523 F.2d 1331, 1342 (2d Cir. 1975).

Further, once the evidence has established that confusion exists in the minds of some, we may infer that it will continue and increase, particularly where the products are in direct competition in the same field. Safeway Stores, supra, 307 F.2d at 499. See also Syntex Laboratories, supra.

calisthenics in their titles, would result in consumer confusion.[16] Here, where a book about Arica will have prospective purchasers in common with those possibly interested in the West product, where both Arica and West will use common channels of marketing, and where both books and techniques are aimed at similar purposes and uses, the need for an exclusive use of the mark psychocalisthenics has been shown.[17] As the purpose of trademark protection is to permit the consumer to make an informed choice by relying upon the mark alone, the existence of the confusing similarity between Arica's and West's products is sufficient to establish infringement.[18]

In determining what relief is proper, a court must attempt to balance the hardships between the parties. While West has

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16/ Tr., pp. 189, 323-326. We, who must place ourselves in the role of a prospective customer, concur. See E.I. Du Pont de Nemours & Co. v. Yoshida International, Inc., 393 F. Supp. 502, 513 (E.D.N.Y. 1975).

17/ See Grotrian, supra, 365 F. Supp. at 714-715. See also Mortellito v. Nina of California, Inc., supra, 335 F. Supp. at 1295.

18/ ". . .[T]he test for infringement is not identity but confusing similarity." Grotrian, supra, 365 F. Supp. at 715.

expended considerable amounts of money and energy promoting his products under the label psycho-calisthenics, the bulk of his advertising occurred after notice of the pendency of this litigation. Given our findings of Arica's prior right to use the mark, extensive investment in publicizing the mark as related to its programs, and of the likelihood of confusion resulting from simultaneous use of the mark by two similar products, permanent injunctive relief is proper.[19] Therefore, we order that, within 15 days of the order which shall be prepared from this opinion, West cease distributing any books, literature, or materials containing the label or title psycho-calisthenics. Further, we order West to withdraw all books or materials in circulation but not yet purchased.[20] Finally, we enjoin West from future use of the word psycho-

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19/ See generally Omega Importing Corp. v. Petri-Kine Camera Corp., 451 F.2d 1190, 1195 (2d Cir. 1971), in which temporary injunctive relief was ordered.

20/ The undisputed testimony of Arica's publisher, expert in the field of book marketing, has persuaded us that placement of a disclaimer on West's book would not suffice to prevent confusion or protect the use of psychocalisthenics as Arica's mark. Further, the use of Arica's or West's name in conjunction with the mark psychocalisthenics does not adequately protect Arica's reputation and good will. See, e.g., A.T. Cross v. Jonathan Bradley Pens, Inc., 470 F.2d 689, 692 (2d Cir. 1972). See also Electronics Corporation of America v. Republic Industries, 507 F.2d 409 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975).

calisthenics in the promotion or advertising of his services and products.

Arica has also requested that we award it $100,000 in monetary damages. Arica claims that this amount, which is equal to the money spent by West in sales promotion of his book, is necessary for Arica to mount a corrective advertising campaign to offset the false impression created by West's ads. We decline to make such an award because, while Arica has made a clear showing of likelihood of confusion, it has not proven that it has sustained actual damage to its reputation or its ability to use psychocalisthenics as it marks. Further, as Arica's book has not yet been released, any monetary award related to the problems caused by West's book would be highly speculative.[21/] Further, Arica has not shown what profits, if any, West has made on the sale of products bearing the psychocalisthenics label.

21/ See generally Feathercombs, Inc. v. Solo Products, Corp., 306 F. 2d 251, 259 (2d Cir. 1962), cert. denied, 371 U.S. 910 (1962), and Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 189 U.S. P.Q. 17, 29 (D. Colo. 1976).

Arica also seeks an award, under 15 U.S.C. § 1117, of attorney fees and costs for the action. Section 1117 provides, in pertinent part, that a court may "in exceptional cases . . . award reasonable attorney fees to the prevailing party." We do not believe that the facts here support of finding that this case is an "exceptional" one making an award of attorney fees appropriate. While some of West's actions, particularly his use of the federal registration symbol, prompt us to doubt the credibility of his statements of inadvertent use of Arica'a mark, there has not been conclusive evidence ofbad faith, malice, or fraud.[22/] Thus, we decline to grant Arica's request for attorney fees.

Turning to West's claims, having found that his use of psycho-calisthenics infringes upon Arica's right to the mark, we deny his request for injuctive relief and dismiss his complaint.

22/ See Blue Bell, Inc. v. Jaymar-Ruby, Inc. 497 F.2d 433 (2d Cir. 1974), n. 18 and accompanying text.

This memorandum opinion constitutes the court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure ("F.R.Civ.P."). Costs are awarded to Arica.

Settle order on 10 days notice in conformity with Rule 65(d) of the F.R.Civ.P.

SO ORDERED.

s/ Charles E. Stewart, Jr.
United States District Judge

DATED: New York, N.Y.
Sept. 1, 1976

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WEST & COMPANY, INC.

Plaintiff,

-against-

ARICA INSTITUTE, INC.

Defendant.

COMPLAINT

Plaintiff, by its attorney, MICHAEL C. DUBAN, complaining of the Defendant, alleges upon information and belief:

1. That the Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its principal office for the transaction of its business in the County of Suffolk, State of New York.

2. That the Defendant is a corporation organized and existing under and by virtue of the laws of the State of New York and has its principal office for the transaction of its business in the City of New York, State of New York

3. That at all the times hereinafter mentioned, the Plaintiff Corporation engaged in the business of publishing a book entitled "Psychocalisthenics" and offered courses on said subject.

4. That at all the times hereinafter mentioned, the Defendant Corporation offered various programs and courses in

mental fitness, meditation and exercise.

5. That the Plaintiff is the owner of a service-mark known as "Psychocalisthenics", which service-mark describes a program for the development for mind ability. This service-mark is affixed to material and literature concerning the Plaintiff's programs and is the title of a book offered and published by the Plaintiff.

6. That the Plaintiff has used this service-mark "Psychocalisthenics" since October 14, 1974 for the aforesaid subjects.

7. That a service-mark registration was issued by the Department of State of the State of New York on November 27, 1974, under number S-2921.

8. That for the purpose of associating in the minds of the general public the Plaintiff's service-mark, the Plaintiff attached said service-mark to its literature and publications.

9. That to-date, a book published by the Plaintiff entitled "Psychocalisthenics" has been circulated generally to the public.

10. That by reason of the unique service-mark and extensive advertising of Plaintiff's publications, and the successful manner in which it has been accepted and purchased by consumers and the general public, the public has grown to associate and

identify the name "Psychocalisthenics" in the manner referred to and bearing the distinctive service-mark "Psychocalisthenics" with the Plaintiff and as the Plaintiff's product.

11. That with full knowledge of the foregoing facts and for the purpose of unfairly competing against the Plaintiff and availing itself of the advertising, goodwill and public consumer acceptance which the Plaintiff has theretofore established for its unique label and service-mark, Defendant has attempted to copy the Plaintiff's service-mark and market programs or course material bearing the Plaintiff's unique service-mark.

12. That the Defendant is selling its product in direct competition with the Plaintiff, and directs the sale of its product to the same consumers as Plaintiff directs its product.

13. That by reason of the foregoing, great confusion has resulted and will continue to result, and the Defendant has misled any consumers into believing that its products are those of the Plaintiff, to the Plaintiff's great loss, all of which was deliberately planned by the Defendant in order to compete unfairly with the Plaintiff and to deceive the public.

14. That the name "Psychocalisthenics" adopted by the Defendant is unlawful infringement upon the service-mark of the Plaintiff's "Psychocalisthenics" as applied to books, publications and course materials, and has been adopted by the Defendant for the purpose of creating confusion and of trading upon the Plaintiff's

goodwill and reputation, in violation of the Plaintiff's prior exclusive right to the service-mark "Psychocalisthenics".

15. That the Plaintiff has heretofore requested the Defendant to discontinue the aforesaid unfair competition, but the Defendant has wrongfully refused and continues to refuse to do so.

16. That by reason of the foregoing the Plaintiff has suffered great damage and will continue to suffer irreparable damage, the amount of which can only be accurately ascertained by an accounting for the profits made by the Defendant through the unlawful infringement and unfair competition, and by a computation of the exact losses of the Plaintiff.

17. The Plaintiff has no adequate remedy at law.

WHEREFORE, the Plaintiff demands judgment as follows:

(a) Restraining and enjoining the Defendant, its agents, servants and employees from using the service-mark "Psychocalisthenics" or any variation thereof in connection with the offering and marketing of programs, lessons, courses or literature relating to the development of the mind.

(b) Restraining and enjoining the Defendant, its agents, servants and employees from using the name "Psychocalisthenics" or any variation thereof on any advertising or promotional material.

(c) For an accounting for all the profits made by the Defendant by reason of and in connection with its wrongful and

unlawful and unfair competition against the Plaintiff in the marketing of programs, course material and literature utilizing the name "Psychocalisthenics" and that the Plaintiff have judgment against the Defendant for all such profits.

(d) For the costs and disbursements of this action.

(e) For temporary injunction pending the trial and final determination of this action, and joining and restraining the Defendant, its agents, its servants and employees from performing or permitting any of the acts enumerated in Paragraphs (a) and (b) of this demand.

MICHAEL C. DUBAN
Attorney for Plaintiff
Office and P. O. Address
630 Third Avenue
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(212) 682-7155

ANSWER AND COUNTERCLAIM BY ARICA INSTITUTE, INC.
(DATED NOVEMBER 19, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WEST & COMPANY, INC.,

Plaintiff,

v.

ARICA INSTITUTE, INC.,

Defendant,

v.

WEST & COMPANY, INC.,
STEVEN WEST,
STEVEN WEST d/b/a MacDONALD-
WINCHESTER PUBLISHERS, and
JONATHAN ADVERTISING, INC.,

Counterclaim Defendants.

- x

75 Civil 5771

JUDGE STEWART

ANSWER AND COUNTERCLAIM
BY ARICA INSTITUTE, INC.

Responding to the Complaint herein, Defendant Arica Institute, Inc. pleads as follows:

1. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1.

2. Admit the allegations of Paragraph 2.

3. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3.

4. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4.

5. Deny the first sentence of Paragraph 5. Lack of knowledge or information sufficient to form a belief as to the truth of the second sentence of Paragraph 5, except admit that PSYCHO-CALISTHENICS is the title of a book offered and published by West & Company, Inc., Counterclaim Defendant herein.

6. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

7. Admit the allegations of Paragraph 7.

8. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8.

9. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9.

10. Deny the allegations of Paragraph 10.

11. Deny the allegations of Paragraph 11.

12. Admit the allegations of Paragraph 12.

13. Deny each and every allegation of Paragraph 13 with the exception that Defendant Arica admits that confusion is likely.

14. Deny the allegations of Paragraph 14.

15. Deny the allegations of Paragraph 15.

16. Deny the allegations of Paragraph 16.

17. Lack of knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17.

COUNTERCLAIM

As and for its Counterclaim, Defendant Arica Institute, Inc. pleads as follows:

18. Arica Institute, Inc. is a not-for-profit corporation of the State of New York with a place of business at 24 West 57th Street, New York, New York.

19. West & Company, Inc. alléges itself to be a corporation of the State of Delaware with a principal place of business in North Babylon, New York.

20. Upon information and belief, Steven West is a citizen of the State of New York, with a place of business at 112 Central Park South, Suite 11F, New York, New York.

21. Upon information and belief, MacDonald-Winchester Publishers is a style of doing business of the said Steven West with a place of business at 112 Central Park South, Suite 11F, New York, New York.

22. Upon information and belief, Jonathan Advertining, Inc, is a corporation of the State of New York with a place of business at 366 Third Avenue, New York, New York.

23. That the parties identified in Paragraphs 19 through 22, supra, shall be hereinafter referred to as the "Counterclaim Defendants".

24. This is an action for using in connection with goods, false designations of origin, false descriptions and representations, including words and symbols, tending falsely to describe or represent the same and causing said goods to enter interstate commerce, and substantially related claims for unfair competition. Jurisdiction of this Court is invoked under 15 U.S.C. 1121 and 1125(a) and 28 U.S.C. 1338(a) and (b).

25. Defendant Arica is, and has been, in the business of conducting training programs designed to initiate and consolidate the developmental process of the human being. Defendant Arica has run training programs in New York State and elsewhere throughout the United States since 1971, involving participation by over ten thousand people.

26. An important part of Defendant Arica's program is the teaching of exercises designed to coordinate breathing and movement, relax tensions, revitalize the body and increase mental clarity.

27. Defendant Arica coined the mark "PSYCHOCALISTHENICS" to identify Arica's unique program of exercises as described in Paragraph 26.

28. Defendant Arica has been using PSYCHOCALISTHENICS to identify its unique program of exercises in New York State and elsewhere throughout the United States since at least as early as the summer of 1973.

29. Defendant Arica has expended considerable sums in the development, publication and promotion of its program identified by the mark PSYCHOCALISTHENICS and Arica's unique PSYCHOCALISTHENICS exercise program has received widespread publicity associating the mark PSYCHOCALISTHENICS with Defendant Arica.

30. Defendant Arica is party to a contract with the publishing house Simon & Schuster calling for the preparation by Defendant Arica of a book relating to the PSYCHOCALISTHENICS exercise program. The book is entitled PSYCHOCALISTHENICS.

31. Upon information and belief, Counterclaim Defendants caused to be published in October 1975 an advertisement in the New York Times for a book entitled PSYCHO-CALISTHENICS.

32. Counterclaim Defendants' book, sold under the name PSYCHO-CALISTHENICS, purports to teach a program of mental and physical exericses.

33. Counterclaim Defendants misrepresent that the name PSYCHO-CALISTHENICS is their registered trademark in the United States Patent and Trademark Office by utilizing the ® symbol in association with PSYCHO-CALISTHENICS. See 15 U.S.C. 1111.

34. Upon information and belief, Counterclaim Defendant Steven West has attended one or more of Defendant Arica's courses.

35. Upon information and belief, Counterclaim Defendant Steven West has attended one or more of Defendant Arica's courses, which include a section on Defendant Arica's exercise program under the name PSYCHOCALISTHENICS.

36. Upon information and belief, Counterclaim Defendant Steven West adopted the name PSYCHO-CALISTHENICS for his book with knowledge of Defendant Arica's use of the mark PSYCHOCALISTHENICS in connection with its courses.

37. Counterclaim Defendants' use of PSYCHO-CALISTHENICS is use of a false designation of origin, false description and representation.

38. Upon information and belief, Counterclaim Defendants caused and procured the name PSYCHO-CALISTHENICS to be used in interstate commerce in connection with the sale of Counterclaim Defendants' goods. Defendant Arica believes that it has been and is likely to be damaged by Counterclaim Defendants' use of said false designations of origin, descriptions and representations.

39. Counterclaim Defendants, by virtue of their publication of the said book under the name PSYCHO-CALISTHENICS, have misappropriated and are now misappropriating Defendant Arica's valuable property rights. Counterclaim Defendants' acts constitute an unauthorized interference with the normal operation of Defendant Arica's legitimate business and are calculated to divert trade and profit from Defendant Arica, all to the unfair advantage of the Counterclaim Defendants.

40. Counterclaim Defendants' course of conduct constitutes unfair competition and, unless restrained, will cause trade to be diverted from Defendant Arica to Counterclaim Defendants and will cause other trade to be lost by Defendant Arica as a result of the mistaken impression that Counterclaim Defendants' activities under the name and mark PSYCHO-CALISTHENICS are interchangeable with those of Defendant Arica or that Counterclaim Defendants are the originators of Defendant Arica's exercises or that the book sold by Counterclaim Defendants is sponsored, licensed or authorized by

Defendant Arica or that there is some connection between Defendant Arica and Counterclaim Defendants.

41. Counterclaim Defendants' course of conduct constitutes willful and deliberate unfair competition and is calculated to trade upon the good will and valuable business reputation of Defendant Arica.

WHEREFORE, Defendant Arica prays:

1. That the Counterclaim Defendants, jointly and severally, their officers, agents, sales representatives, servants, employees, associates, attorneys, their successors and assigns, and all persons acting by, through, under or in active concert or in participation with them, be preliminarily and permanently enjoined from:

(a) using in connection with any goods or services the mark PSYCHOCALISTHENICS or any colorable imitation thereof or any mark confusingly similar thereto;

(b) using in any way Defendant Arica's mark PSYCHOCALISTHENICS or other false designation of origin in connection with Counterclaim Defendants' goods or services or in any way falsely representing that Counterclaim Defendants are the originators or original manufacturers of Defendant Arica's services or that the services of Counterclaim Defendants

are in any way sponsored, licensed, made or distributed by Defendant Arica, or that there is any connection between Counterclaim Defendants and Defendant Arica;

(c) misappropriating Defendant Arica's valuable property rights;

(d) competing unfairly with Defendant Arica.

2. That Counterclaim Defendants deliver up for destruction under Defendant Arica's supervision, all copies of Counterclaim Defendants' books, literature and other materials of any nature whatsoever bearing the name and mark PSYCHO-CALISTHENICS in the possession of them or any of them.

3. That Counterclaim Defendants abandon any applications and/or registrations which they own or control for the mark PSYCHO-CALISTHENICS.

4. That Counterclaim Defendants be required to account to Defendant Arica for all profits realized by them resulting from the use of Defendant Arica's mark PSYCHOCALISTHENICS and for all damages sustained by Arica on account of Counterclaim Defendants' use of PSYCHO-CALISTHENICS.

5. That Defendant Arica recover from the Counterclaim Defendants the cost of this suit and reasonable attorneys' fees.

6. That Defendant Arica have such other and further relief as this Court may deem just and proper.

KANE, DALSIMER, KANE, SULLIVAN
and KURUCZ

November 19, 1975

DAVID H. T. KANE
420 Lexington Avenue
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(212) 532-9400
Attorneys for Defendant
Arica Institute, Inc.

OF COUNSEL:

Siegrun D. Kane, Esq.
John J. Caslin, Jr., Esq.

ANSWER TO COUNTERCLAIM DATED NOVEMBER 20, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WEST & COMPANY, INC., Plaintiff, v. ARICA INSTITUTE, INC., Defendant, v. WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MacDONALD-WINCHESTER PUBLISHERS, and JONATHAN ADVERTISING, INC., Counterclaim Defendants.	ANSWER TO COUNTER-CLAIM 75 Civ. 5771

Answering the Counterclaim herein, Counterclaim Defendants WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MC DONNEL-WINCHESTER PUBLISHERS respond as follows:

1. Admits the allegations of paragraphs numbered 18 through 21 inclusive.

2. Admits the allegations of paragraphs 31 and 34.

3. Denies the allegations of paragraphs 24, 27, 28, 29, 32, 33, 35, 36, 37, 38, 39, 40 and 41.

4. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 22, 25, 26 and 30.

FIRST AFFIRMATIVE DEFENSE:

5. The Counterclaim fails to state a claim against the above Defendants upon which relief can be granted in that this

Court lacks jurisdiction over the subject matter of this action and Counterclaim. This action was originally commenced in the Suprem Court of the State of New York based upon an infringement of a trademark registered in the State of New York. There is no Federal jurisdiction over this matter.

WHEREFORE, the above named Defendants demand judgment dismissing the Counterclaim against said Defendants, remanding this action to the Supreme Court of the State of New York, together with the costs and disbursements of this action.

Dated: New York, New York
November 28, 1975

MICHAEL C. DUBAN

Michael C. Duban

Attorney for Defendants
WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a/
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DECISION OF JUDGE GAGLIARDI DATED DECEMBER 11, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEST & COMPANY, INC.,

Plaintiff,

-against-

ARICA INSTITUTE, INC.,

Defendant,

-against-

WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MacDONALD-WINCHESTER PUBLISHERS, and JONATHAN ADVERTISING, INC.,

Counterclaim Defendants.

75 Civ. 5771 (CES)

MEMORANDUM

GAGLIARDI, DISTRICT JUDGE:

This is an application by Arica Institute, Inc. ("Arica") for a preliminary injunction restraining West & Company, Inc., Steven West, Steven West d/b/a MacDonald-Winchester Publishers and Jonathan Advertising, Inc. (hereinafter collectively referred to as "West") from distributing a book entitled Psycho-Calisthenics and from using the term "psychocalisthenics" in any other manner. Arica contends that it has a proprietary right in "psychocalisthenics" as its service mark. Original jurisdiction is based on 15 U.S.C. §§1121 and 1125(a) Federal-Mogul-Bower Bearings, Inc. v. Azoff, 313 F.2d 405 (6th

Cir. 1963); Beech-Nut, Inc. v. Warner-Lambert Co., 480 F.2d 801 (2d Cir. 1973); Natcontainer Corp. v. Continental Can Co., Inc., 362 F. Supp. 1094 (S.D.N.Y. 1973).

Arica alleges that it is a non-profit organization which since 1971 has conducted training programs "designed to initiate and consolidate the developmental process of the human being." It claims to have coined the term "psychocalisthenics" in June, 1973 to identify a series of exercises which it developed to "revitalize the body and increase mental clarity." Arica's book - Psycho-Calisthenics - is scheduled to be announced to the trade on December 17, 1975.

West alleges that it is also involved in the field of "mind sciences" and uses the term "psychocalisthenics" to refer to its program for the development of "mind ability." West registered the term "psychocalisthenics" with the New York Department of State in November, 1974 and in the fall of 1975 published a book entitled Psycho-Calisthenics describing its program of mental exercises.

The threshold question here is whether the term "psychocalisthenics" is distinctive and thus capable of functioning as a service mark indicating origin, or whether it is merely descriptive or generic, indicating characteristics of the service, not its origin, so that no one may have an exclusive right to use it without first establishing a "secondary meaning" for it

through promotion and exposure. 15 U.S.C. §1052(e); Miss Universe, Inc. v. Patricelli, 408 F.2d 506 (2d Cir. 1969); Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403 (S.D.N.Y. 1974).

Arica claims that the word was coined by its founder Oscar Ichazo. While the compound word "psychocalisthenics" does not appear in any dictionary, its components are a common prefix and word, and certainly convey descriptive information. Whether a term is descriptive is to be determined by whether it directs attention to "the qualities, ingredients, appearance, effect, purpose, or other features of goods or services...." 3 Callman, Unfair Competition, Trademarks and Monopolies §71.1 (3d Ed. 1969). The descriptive meaning should be understood in relation to the particular services to which the mark is applied without exercising "powers of perception or imagination." In re One Minute Washer Co., 95 F.2d 517, 520 (C.C.P.A. 1938); Flexitized, Inc. v. National Flexitized Corp., 335 F.2d 774 (2d Cir. 1964), cert. denied 380 U.S. 913 (1964).

In the instant case, we conclude that the combination of "psycho" and "calisthenics" directs attention to exercises which are intended to have an effect on the mind or mental processes. Arica has used the word to refer to its series of yoga-like movements and breathing exercises which are intended to benefit the mental processes. West has used the word to

refer to its series of mental exercises which are intended to develop the mental processes. Clearly these two programs for personal development are not the same. However, we find that the term "psychocalisthenics" is descriptive as applied to either program because it refers generically to the general class of physical and mental exercises which are intended to affect mental processes. Both parties' programs fall into this class. We note that the term is used in this sense by Esalen Institute, an organization unrelated to the present litigation, which offers "a variety of disciplines and forms, including psychocalisthenics, meditation, gestalt, intuitional sensing...." (Finnell Affidavit Exhibit A).

Our finding that the term "psychocalisthenics" is descriptive does not end our inquiry. A descriptive term may function as a service mark if it has developed "secondary meaning." Miss Universe, supra, 408 F.2d at 509. This secondary meaning may be established if one party has used a mark exclusively and extensively over a period of time in advertising and promoting a service so that the purchasing public has come to associate the mark with its origin. The inquiry into the consumer's attitude is "...does [the term] denote...'a single thing coming from a single source?'" Aloe Creme Laboratories, Inc. v. Milsan, Inc., 423 F.2d 845, 849 (5th Cir. 1970), cert. denied 398 U.S. 928 (1970).

The principal evidence offered to show association between Arica and "psychocalisthenics" was the affidavit of George J. Goodman who has written, under the pen name Adam Smith, a book on the "mind sciences," Powers of Mind. Goodman stated that he had never heard "psychocalisthenics" used other than to describe Arica's program. Michael Korda, editor and chief of Arica's publisher Simon & Schuster, testified at the evidentiary hearing that he had only heard the word used in association with Arica. We find that this is insufficient evidence of consumer attitude to constitute a "clear showing" of "probable success" in proving secondary meaning. Thus Arica is not entitled to a preliminary injunction under the Second Circuit's first test as enunciated in Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973).

We also find that Arica has failed to meet the Second Circuit's alternative standard. Two and a half years is a very short time in which to establish secondary meaning absent a showing of unusual publicity, which has not been made here. See Evelyn Wood Reading Dynamics Institutes of America, Inc. v. Zimmerman, 134 U.S.P.Q. 475 (N.D. Cal. 1962); Exquisite Form and Aloe Creme, both supra; Fund of Funds, Ltd. v. First American Fund of Funds, 274 F. Supp. 517 (S.D.N.Y. 1967). Further, it appears that during much of this time, Arica's use of the term

has not been exclusive since both West and Esalen Institute have used it, and this weighs against development of secondary meaning. American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3 (5th Cir. 1974). The evidence produced so far of association in the minds of the consuming public has been negligible. Thus, at this point we must conclude that Arica has not made a "clear showing" of a sufficiently serious question on the issue of secondary meaning to make it a fair ground for litigation. Sonesta, supra. Nor do we find a "balance of hardships tipping decidedly toward" Arica (Id.). Any harm through consumer confusion which Arica may suffer is certainly balanced by the hardship which West will suffer should all aspects of its business involving "psychocalisthenics" be enjoined.

Arica's motion for a preliminary injunction is, accordingly, denied.

SO ORDERED.

United States District Judge

Dated: New York, N. Y.
December 11, 1975.

ANSWER TO COUNTERCLAIM OF JONATHAN ADVERTISING, INC.
DATED MARCH 26, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEST & COMPANY, INC.,	:	
Plaintiff,	:	ANSWER TO COUNTERCLAIM
v.	:	75 Civ. 5771
ARICA INSTITUTE, INC.,	:	Judge Stewart
Defendant,	:	
v.	:	
WEST & COMPANY, INC., STEVEN WEST, STEVEN WEST d/b/a MacDONALD-WINCHESTER PUBLISHERS, and JONATHAN ADVERTISING, INC.,	:	
Counterclaim Defendants.	:	

Answering the Counterclaim herein, Counterclaim Defendant JONATHAN ADVERTISING, INC. responds as follows:

1. Admits the allegations of paragraphs numbered 18 through 22 inclusive.

2. Admits the allegations of paragraph 31.

3. Denies the allegations of paragraphs 24, 27, 28, 29, 32, 33, 36, 37, 38, 39, 40 and 41.

4. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 25, 26, 30, 34 and 35.

FIRST AFFIRMATIVE DEFENSE:

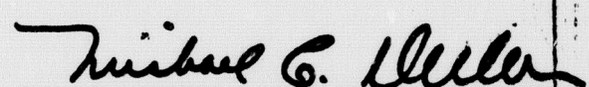
5. The Counterclaim fails to state a claim against the

above Defendant upon which relief can be granted in that this Court lacks jurisdiction over the subject matter of this action and Counterclaim. This action was originally commenced in the Supreme Court of the State of New York based upon an infringement of a trademark registered in the State of New York. There is no Federal jurisdiction over this matter.

WHEREFORE, the above named Defendants demand judgment dismissing the Counterclaim against said Defendant, remanding this action to the Supreme Court of the State of New York, together with the costs and disbursements of this action.

Dated: New York, New York
March 26, 1976

MICHAEL C. DUBAN



Attorney for Counterclaim Defendant, JONATHAN ADVERTISING, INC.
Office and P. O. Address
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WEST & CO., INC., Plaintiff,	Before: HON. CHARLES E. STEWART, District Judge.
vs.	
ARICA INSTITUTE, INC., Defendant.	75 Civ. 5771

New York, June 9,10,14, 1976

STENOGRAPHER'S MINUTES

gw:mg

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

WEST & CO., INC.,

Plaintiff,

v. 75 Civ. 5771

ARICA INSTITUTE, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - -x

B e f o r e:

HON. CHARLES E. STEWART, JR.,
District Judge

New York, New York
June 9, 1976
10:00 a.m.

APPEARANCES:

MICHAEL C. DUBAN, Esq.,
Attorney for Plaintiff

KANE, DALSIMER, KANE, SULLIVAN & KURUCZ, Esqs.,
Attorneys for Defendant
DAVID H. T. KANE, Esq.,
MRS. SIEGRUN D. KANE,
MRS. VIRGINIA R. RICHARD,

Of Counsel

THE CLERK: West & Co., Inc. v. Arica Institute.

THE COURT: Mr. Duban, are you ready to proceed?

MR. DUBAN: Yes, we are.

THE COURT: Are you ready to proceed?

MR. KANE: Yes.

THE COURT: Counsel, how do you wish to proceed?

MR. DUBAN: Your Honor, I believe that I will present the plaintiff's case first. There is a counter-claim However, plaintiff will proceed first in accordance with the arrangements I have worked out with Mr. Kane.

THE COURT: All right.

Do you wish to make opening statements?

MR. DUBAN: Yes, your Honor, I do.

THE COURT: Mr. Kane?

MR. KANE: I will, your Honor.

THE COURT: All right, Mr. Duban.

MR. DUBAN: Before I get into the opening statement, your Honor, I would like to record an objection to the fact that I have not been furnished with a list of witnesses although we have furnished Mr. Kane with them. I have not to this date received any from him, which puts me at a very great disadvantage on cross-examination.

THE COURT: I would think so, Mr. Kane.

What about that?

MR. KANE: Your Honor, we had not settled on our witnesses until yesterday afternoon. I didn't realize I was under an obligation to furnish them any particular time. I offered them to Mr. Duban this morning when he raised it with me and he told me he wouldn't take it, but we have made it up and it is here.

THE COURT: Does Mr.Duban have it?

MR. DUBAN: No.

MR. KANE: It is here on the table. He declined to take it.

MR. DUBAN: I will take it but it doesn't give me a lot of time to work on it.

THE COURT: All right, Mr. Duban, let's proceed. If it becomes clear you will be prejudiced in any way, we will deal with it.

MR. DUBAN: Thank you, your Honor.

Your Honor, this is an action that was origina brought in the Supreme Court of the State of New York by West & Company against Arica to enjoin them from the use of the name Psychocalisthenics.

West & Company is a corporation which is owned 100% by Steven West. West & Company claims the use of the trade name or trademark Psycho-Calisthenicsin connection with its courses and book of the same name.

Mr. West has caused West & Company to file and receive a registration of that mark with the New York State Department of State and there was an application filed with the United States Patent Office for that name.

The New York State registration was granted to West & Company on November 20, 1974.

Previously Mr. West individually had conceived of the name and used the name in 1972, approximately July of 1972, to which he will so testify.

Mr. West has developed a series of courses and materials and a book entitled Psycho-Calisthenics which is presently being published and sold. To date he will testify there have been approximately 50,000 copies sold.

Mr. West has expended large sums of money in advertising the name Psycho-Calisthenics and he has exposed the name in various publications and periodicals throughout the country being associated with his name.

Arica has counterclaimed and removed this case to the federal court claiming prior usage and appropriation of the name Psychocalisthenics.

Their claim is based upon their first usage in 1973. They have, subsequently to our filing for a registration --

THE COURT: I thought they went back to 1972 in

their brief?

MR. DUBAN: That is the plaintiff, your Honor, went back to 1972. The defendant and counterclaim plaintiffs claim 1973 as their date.

Mr. Kane, attorney for Arica, claims that there is an inconsistency between our dates of first usage in that in our registration applications, we used October of 1974 as our date of first usage, which is the date of first usage of the corporate plaintiff.

However, Steven West, who is the sole owner of the corporation, has used it prior to that date.

Arica is seeking to enjoin West and for damages.

Plaintiff West will show by its witnesses that it has in fact used the name Psycho-Calisthenics prior to Arica and has used it commercially in an attempt to appropriate it for its own mark.

THE COURT: Mr. Duban, you say you began to use the name at least in July, 1972, is that right?

MR. DUBAN: Yes, your Honor.

THE COURT: What is the legal consequence of the fact that, as I am told by Mr. Kane, the Patent Office allowed their application for a trademark on June 1, 1976, and, also, in that connection, he also tells me you abandoned your application for a trademark?

MR. DUBAN: I believe Mr. Kane's application was allowed for publication, which gives us time to oppose it, which we certainly intend to do.

In Patent Office procedure you can challenge a trademark at several stages. You can challenge it before it is issued or you can challenge it after it is issued.

We will now oppose his application by filing a notice of our opposition. Ours has not been abandoned but technically abandoned since we have a discrepancy between the two days and I would like to clear that up first and I would like to have these two proceedings completed so that we know exactly where we are because it may be academic.

But we, however, do intend to vigorously proceed and try to get the mark.

THE COURT: All right.

MR. KANE: Your Honor, a point that I think the case revolves around to a basic extent is the nature of the trademark we are talking about here. The mark Psychocalisthenics appears in no dictionary, it appeared in no trade books until the parties in suit got busy with their printing presses. It is not a word of the language. It is a coined term. As such, it develops into a trademark by a slightly different set of rules and standards than a word that has to be pulled out of the language, appropriated

from the language.

In this case we think it is significant that it was Mr. West who first filed to register this name. He filed in New York State where there is no examination and his registration was allowed.

We think it is significant that it was Mr. West who first filed in the United States Patent Office where there is an examination. We have the file history of his actions in the Patent Office and we will introduce it.

It will show that his application was rejected by the United States Patent Office on two grounds. No. 1, the name was descriptive. This was the same objection Arica faced, and later overcame.

No. 2, the Patent Office said: Where is your specimen of first use because it is integral to the Patent Office system and the United States Trademark law that you must use your mark with the goods or services in order to register it?

One thing the Patent Office insists upon is you put in a specimen of how you used it.

We filed a copy of this bus poster that was used with our name on it when we filed.

In Mr. West's case, the United States Patent Office file shows a piece of paper, a scratch sheet with

the name typed on it. So the Patent Office inquired where is the specimen of your first use, the label, or the manner in which you used the mark.

To that request West never replied. The reply was due in the first week of February of this year. The date was permitted to go by and as of last week no response had been filed and the case was marked officially abandoned.

During our pretrial examination of Mr. West we came across the same point; Where was the use that was being made in October of 1974, the use that is recited in your New York State application, your U. S. application?

And Mr. West on the record helpfully volunteered to help us find a brochure. He referred to a two or three-page brochure and offered to get us a copy. We asked for it and this morning Mr. Duban tells me it cannot be located and will not be produced, there will be no record here.

This turns to what do we have by way of printed record of Mr. West's activity, and I think the facts we are going to hear at the trial today are that we have nothing in paper until the early drafts of his book which only went to the printer and became a printer's proof last summer, the summer of 1975.

This will be contrasted with the manner in which Arica put the name before the public on paper in high volume

from the summer of 1973 continuously on until now. Again and again course announcements, feature articles written by outside reporters, press releases, the name Psychocalisthenics appears, appears and appears.

It will be interesting to note in this public press literature how the reporters do not just say: We went to Arica and took a Psychocalisthenics course. Each time the reporters seemed to realize he was dealing with a word he had not dealt with before. Each time you will find the text say: We took Psychocalisthenics - a series of explanations or some other explanation as to what Psychocalisthenics meant, because the reporter knew he was not dealing with a word of the English language, he was dealing with a coined term which had to be explained.

Arica has explained it. They have explained it with their course exercises given to thousands and thousands of people. Some students will be here, some trainers will be here, outside independent viewers of the scene will be here to testify in court as to their knowledge of Arica, their knowledge of this entire field, and their knowledge that Psychocalisthenics has been used to identify only the courses of Arica until Mr. West went to press late last year.

We think that the Patent Office action on the

Arica application is deserving of great weight in this case.

Our brief cites this recent Second Circuit decision, Abercrombie v Hunting World, on page 11 of our first brief, and it says,"The decision of the Patent Office to register a mark without requiring proof of secondary meaning affords a rebuttable presumption that the mark is suggestive or arbitrary or fanciful rather than merely descriptive."

Now that is the presumption that Arica has going for it today. Our application was allowed. We filed our proofs in Washington. We went under oath and submitted all our specimens and now we are in court asking for relief against Mr. West.

THE COURT: All right.

MR. DUBAN: I would like to call as our fist witness John Finnell.

J O H N F I N N E L L, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBAN:

Q Mr. Finnell, what is your occupation?

A I am an attorney, admitted to practice in New York State.

Q What is your professional background?

A I was admitted to the bar in 1960. I served as an Assistant Attorney General in New York State from 1960-- 1961 to 1965, and from that time, from 1965 until 1967 -- 1970 -- make that 1973 I was the Commissioner of the New York Tax Commission.

I served in that capacity and then have practiced law since 1974.

Q Are you acquainted with Steven West?

A Yes, I am.

Q When did you become acquainted with him and how?

A I first met Steven West some time in 1968 at a party.

Q Did you have any associations with him after that date?

A Yes, I have.

Q What type of associations?

A I would say principally since 1968 they were social in that we used to see each other quite frequently, and then in connection with the Psycho-Calisthenics and the publication of his book, I have had several associations, meetings, with him, and at one time I was working with him in connection with a proposed restaurant enterprise.

Q What is your interest, if any, in the

Psychocalisthenics endeavor?

A I have no business interest. I have a personal interest in that I have been very interested in that field, related fields of psychology and mind science and personal improvement.

So when I became aware of Mr. West's plans to write a book and the courses he was designing, it further cemented my personal relationship with him.

Q Did you submit an affidavit in these proceedings in connection with a motion that was on in the latter part of 1975?

A Yes, I did.

Q As an exhibit to that affidavit did you refer to Esalen Institute's use of the name Psychocalisthenics?

A Yes, I did.

Q How did that come to your attention?

A I am on their mailing list and I try to keep aware of the fields and different courses available. I noticed that the Esalen catalog contained in one of the descriptions of their courses, although I don't recall which one, but they did use the phrase Psychocalisthenics.

Q Have you heard anyone else besides Mr. West and Esalen ever use the name Psychocalisthenics?

A I don't recall the first time I heard the term

Psychocalisthenics. I do know that at a course, and it was really a trial and error experimental type course, but that Steven invited me one time in 1972 at his apartment-- it was at some hotel in New York -- and it was supposed to be a forerunner, a training course for the course and book he was planning. I recall the term Psychocalisthenics was used by Steven West.

I honestly can't recall when I first heard the term.

Q You don't know whether Mr. West coined the term or whether he was just picking up a term that had been used prior to that date?

A I really do not know.

Q What other contact have you had with Mr. West with respect to Psycho-Calisthenics either a book or any other course he may have held?

A Since 1972 I was given a draft of what the proposed book, which was called Psycho-Calisthenics, and I was asked by Steve if I wouldn't help him by editing it, looking for typos and, in effect, participating with him in bringing this to fruition.

THE COURT: Did you say "since 19,2" or "in 1972"?

THE WITNESS: I would say I first became aware of a book, a draft, in 1973, your Honor.

Q Did you in fact help Mr. West with that manuscript?

A Yes, I did.

Q And did he incorporate any of your suggestions or changes in it?

A I believe so, yes.

Q Did you see the book in its final printed form?

A Yes.

Q Did it contain some of your suggestions in it?

A Yes.

Q Were you ever at any other meetings or classes or courses that Mr. West may have given in which the name Psychocalisthenics was used or the course called that?

A Yes, there was one last year as well. It was a larger group of people than the one previous, and I believe that was held in the Navarro Hotel, also Mr. West's residence.

Q Do you recall how many people attended that first meeting you were at?

A I am just guessing. I would say roughly ten, maybe a few less or more.

Q Did you know any of the people that were at that meeting?

A Yes, I did.

Q Do you recall who they might have been?

A I recall Mr. West's wife.

Q What is her name?

A Janice.

And I also recall his brother Neal, whom I know.

Q And there were other people you are not acquainted with?

A I met them there but I didn't keep up with them.

Q Since the publication of Mr. West's book Psycho-Calisthenics, have you seen any advertisements in any newspapers for that book?

A Yes, I have.

Q Where have you seen advertisements?

A The book Psycho-Calisthenics?

Q Yes.

A I believe Psychology Today, Village Voice.

Q Have you seen advertisements for any other books entitled Psycho-Calisthenics?

A No, I have not.

MR. DUBAN: Your witness.

CROSS-EXAMINATION

BY MR. KANE:

Q At the Navarro Hotel meeting, was that in October or November of last year?

A I really don't remember that.

Q Or December?

A I believe it was in the fall, but I don't recall the date.

Q Do you recall the month?

A No, I don't.

Q Do you recall the month of the 1972 meeting you testified about?

A I believe it was in the summer.

Q Do you recall the month?

A No. I assume it was either June or July or August.

Q Your affidavit was referred to in the direct examination, the affidavit you put in on preliminary injunction. It contained an exhibit, Exhibit A you referred to.

I hand you a copy of the affidavit and the exhibit.

Did you say that that exhibit came to you because you were on the Esalen mailing list?

A I don't recall whether it came to me because I was on the Esalen mailing list or specifically whether I got a copy, but I know I had a copy of this in my possession in my apartment.

MR. KANE: Here is another copy, your Honor, an

extra copy.

A I am on the Esalen mailing list. I do get a lot of their brochures. This one specifically I had in my apartment.

Q It was from you that it came to be an exhibit on your affidavit?

A That is correct.

Q Mr. West didn't supply it to you?

A No.

Q It refers on its face to certain weeks in April. Those are April 1976 weeks, are they not?

A I really don't - when I gave that exhibit, I don't even recall the date, what year it was, and I don't even know the date to this day.

Could you tell me when it was?

Q In the lower left-hand corner of your exhibit there it says "The weekend of April 16 through 18," and in 1976, April 16 was a Friday and the 18th was a Sunday.

A I looked through a lot of the literature that I had in my apartment, including books, catalogs, whether it be Esalen or whatever, and I did find this particular phrase used, Psychocalisthenics. I don't know the year of this catalog.

Q Where did you find it used?

A Pardon?

Q Where did you find it used?

A I didn't hear your question.

Q You said you looked through these books and records and papers in your apartment and you found the word Psychocalisthenics used?

A I found an Esalen catalog from which this is an Xeroxed copy of one of the pages.

Q This, then, Exhibit A to your affidavit, is the single use of Psychocalisthenics you found in the search of your apartment?

A It is a reference to Psychocalisthenics that I found in my apartment,yes.

Q It is the single reference to Psychocalisthenics that you found in your apartment?

A That's true. I didn't really conduct -- I didn't go through every book or every catalog that I have.

Q Will you leave it as your testimony under oath in this court today that you don't know what year this Esalen catalog you submitted as an exhibit to your affidavit comes from?

A That's true.

Q The meeting that you attended in 1972 with Mr. West that you testified about,did you pay a fee for that

meeting?

A No, I didn't.

Q Did you see any advertising for that meeting?

A No, I did not.

Q Was there any literature distributed at that meeting?

A I believe not. I just got a phone call asking me to come over.

Q Who called?

A Steve.

Q How much in advance of the meeting?

A I'd say a couple of weeks.

Q Have you ever been involved in any civil or criminal proceeding as a party?

A Yes.

Q Any criminal?

A No.

Q Any civil?

A Yes.

Q Within the last five years?

A Yes.

Q How many?

A I was in a domestic suit, divorce.

Q Anything else?

A Yes, a promissory note.

Q Is that still pending?

A No, I believe-- no, it is resolved.

Q Anything else?

A No.

Q Are you familiar with the defendant here, Arica?

A Yes, I am.

Q How long have you known of them?

A I don't know the date, but I think the first time I heard of them was advertisements for like Wednesday night orientations. I have seen some ads in different newspapers.

Q Have you ever attended an Arica orientation meeting or training course?

A I did attend one-- it was an orientation lecture, I would call it, two hours.

Q What year was that?

A Maybe three years ago, two or three years ago.

Q Was Psychocalisthenics mentioned at that Arica meeting?

A I don't recall specifically that. It was a lecture. I believe one young lady was seated on a cushion and I believe there was a large group of people in the East Fifties.

Q How many, approximately?

A How many people were there? Maybe 50, 50 to 100.

Q Are you an attorney for West in this action?

A No, I am not.

Q How did you come to serve the State court complaint?

A I was asked to.

Q And did you think it was proper to do so?

A Yes.

Q Does it affect your ability to come here and testify as a witness?

A No, not in my opinion.

MR. KANE: No further questions.

MR. DUBAN: No questions.

THE COURT: You may step down.

(Witness excused)

MR. DUBAN: I would like to call Janice West.

J A N I C E H E N N I N G S E N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBAN:

Q Mrs. Henningsen, were you ever married to Steven West?

A Yes, I was.

Q During what dates, or from what date to what date were you married to Mr. West?

A We were married from December 12, 1965 to November of 1973.

Q And were you divorced in November of 1973?

A Yes.

Q Have you subsequently remarried?

A Yes, I have.

Q And are you currently married?

A Yes, I am.

Q Do you recall any time during your marriage that Steven West became interested in mind control or mental control?

A Yes, I do.

Q Do you recall approximately when he became interested in that?

A Well, he has always been interested in it. I would say that his extreme interest and his development started in 1970.

Q Did you ever join him in any endeavors or ventures in the mind control field?

A I participated in some, yes.

Q And what type of activities did you participate in?

A In July and August we were living in the Windham Hotel.

Q What year was that?

A 1973. In New York. And we ran two seminars.

Q That's in July of 1973?

A Yes.

Q You are sure of that year?

A Excuse me. I am sorry. It is July of 1972.

Q And what type of seminars did you participate in?

A They were mind exercise seminars.

Q How many of those seminars were there, approximately?

A There were two.

Q There were two. Do you know the date of those exactly?

You said July?

A Yes. My children went to camp. One was in July and one was in August.

Q Do you know who attended the July meeting?

A The July meeting was attended by Al Fraticelli and Marian Fraticelli, Neal Watstein, Shelly Bobkin, Jack Finnell and Sheldon Rose.

Q Are any of those persons related to Mr. West?

A Yes. Neal Watstein is his brother.

Q Were there any other parties who attended?

A Not that I can recall except myself.

Q In the August meeting, do you recall how many people attended that session?

A I believe there were approximately ten people.

Q Do you know who those people were?

A They were the same people.

Q Do you recall if in the July session there was any reference made to the term Psychocalisthenics?

A Yes, there was.

Q And who made that reference?

A Mr. West.

Q And in what connection did he make that reference?

A In the name of the seminars that he was running us through.

Q Had you ever heard Mr. West use that term before 1972, before July of 1972?

A Yes.

Q When was that?

A It was 1971 when we were discussing certain names and he was thinking of writing a book and just reading by different titles.

Q Did you ever, outside of these two meetings in July and August of 1972, have any further relationship

with Steven West with respect to Psychocalisthenics?

A Yes, I did.

Q And what was that?

A In January of 1973 we went to Hong Kong, and in the broker's office, Tony Law, we proceeded to take down some of his mental notes and some of his thoughts, and I typed them in his office for him.

MR. KANE: I couldn't hear that answer.

A In Hong Kong in 1973, January, we were at our broker's office, Tony Law, and Steven West gave me some notes on mental thoughts and I used one of the secretary's typewriters and I typed them down for him.

Q Do you know where those notes are today?

A No, I don't.

Q Were they discarded by you or have you just lost track of them?

A There were several moves in between so I really couldn't tell you.

Q Have you had any other contact with Mr. West's Psychocalisthenics activity?

A No, I have not.

Q Did you sort of lose contact with him after your divorce?

A With the course or with Mr. West?

gw:mg Henningsen-cross

Q Yes.

A Yes. From time to time I would see literature.

Q But you had no active interest after your divorce from him?

A None whatsoever.

MR. DUBAN: Thank you.

Your witness.

CROSS-EXAMINATION

BY MR. KANE:

Q Do you have any present financial relationship with Mr. West?

A No.

Q Is he obliged to pay you any moneys as a result of the divorce settlement?

A No.

Q The children?

A No.

Q When did he ask you to come here and testify today?

A I believe it was a week ago.

Q Did he call you or visit you?

A He called me.

Q What did he ask you to do?

A He asked me if I would come and testify and tell

them exactly what happened.

Q What happened where?

A With the Pscychocalisthenics courses that we ran and several things like that.

Q Did he refer literally to the Psychocalisthenic courses that you ran in 1972?

A I am not following you.

Q Who brought up the subject?

A He asked me if I would come and testify for him.

Q On what subject?

A On the subject of his book, Psycho-Calisthenics.

Q When did the 1972 meetings get mentioned?

A They didn't.

Q In that first phone call he didn't mention the meetings?

A No.

Q He just mentioned the book?

A He just said "Would you please come up and testify?"

Q And you said you would?

A Certainly.

Q And what further conversations have you had with him before you took the stand this morning?

A None.

Q What further conversations have you had with anybody about the subject of your testimony before you got on the stand this morning?

A The only subject had was I called Mr. Duban and I asked him for the address of the courthouse.

Q And did you talk with him about your testimony this morning?

A No. He just told me it was in Judge Stewart's chambers and he wasn't sure whether it was in the chamber or the courtroom and he told me -- I am not familiar with New York-- Centre Street, Foley Square, and that was it.

Q When you came in the courtroom this morning,you went and sat with Mr. West?

A Right.

Q Had there been any conversation between you from that first phone call asking you to testify to the moment when you sat down with him this morning?

A Our conversations are very limited.

Q But would you answer the question?

A No. I told you we had one conversation and that was it.

Q The meeting in 1972 that you testified to --

A Right.

Q -- when was the last time you spoke about those

1972 meetings with anyone?

A With anyone?

Q Anyone.

A I guess it really was as recent as a month ago.

Q Who was that?

A That was with Shelly Bobkin.

Q What was the occasion?

A She called me to congratulate me on my marriage and asked me how my children were. She is in Toronto. And to ask me whatever happened with the book and the Psycho-Calisthenics since she was in Toronto. That came up in the conversation.

Q The 1972 meetings-- strike that.

Did you listen to Mr. Finnell's testimony here this morning?

A Yes, I did.

Q Do you essentially agree with it about the 1972 meetings?

A Yes, essentially.

Q That there was no fee charged?

A No.

Q That there was no advertising for the meetings?

A Not that I know of.

Q That there was no literature handed out?

A Definitely no literature.

Q How were the five people selected who you identified as coming to the July meeting?

A There were more than five.

Q Yourself and Mr. West?

A How were they selected?

Q Yes.

A Well, I believe Mr. West knew these people and he picked up the phone and decided that they were very bright people and that they could help him on his course.

Q Help him to develop a course?

A No, just help him to give him some feedback on the course.

Q And, of course, you had known Mr. Watstein for some time?

A Yes.

Q Before the meeting. How long had you known Shelly Bobkin before the meeting?

A Three years.

Q How long had you known Jack Finnell before the meeting?

A I met him at the meeting.

Q He testified he has known your husband since 1968?

A Right.

Q But you only met him in 1972?

A Right.

Q How about Sheldon Gross-- not Gross-- Rose?

A Sheldon Rose I knew for about two years.

Q What was his relationship to your husband?

A None.

Q Was he a teacher of your husband?

A He taught some mind control courses.

Q Which your husband took?

A Right.

Q How about Fraticelli, how long had you known him before the 1972 meeting?

A Since 1964.

MR. KANE: No further questions.

MR. DUBAN: I would like to ask one further question, your Honor.

REDIRECT EXAMINATION

BY MR. DUBAN:

Q Mr. Kane made a point of asking you whether you had any conversations with Mr. West when you came into the courtroom this morning and sat down next to him.

I show you this and ask you if Mr. West gave you this note when you came in?

A Yes, he did.

Q Would you read it, please?

A "How do you feel?"

MR. DUBAN: I have no further questions, your Honor.

MR. KANE: No more, your Honor.

(Witness excused)

MR. DUBAN: I would like to call Jonathan Gubin to the stand.

J O N A T H A N G U B I N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBAN:

Q Mr. Gubin, what is your occupation?

A I own an advertising agency.

Q How long have you been in the advertising field?

A Approximately fifteen years.

Q Did there come a time when you became acquainted with Mr. West?

A Yes.

Q And when was that?

A Late last summer, August perhaps, of 1975.

Q What was the occasion for your meeting?

A Mr. West was interviewing advertising agencies. He was looking to select an agency to market the book Psycho-Calisthenics, which he was in the process of publishing.

Q How were you introduced to him?

A Through a mutual friend of ours who was a printer.

Q And what was said on the occasion of your first meeting with Mr. West?

A Well, on the occasion of our first meeting, I presented the credentials of my advertising agency and how I thought we could and should market the book, and he showed me a manuscript copy of the book, Psycho-Calisthenics.

Q Was that the first time that you had ever heard of the name Psycho-Calisthenics?

A Yes.

THE COURT: When was this?

THE WITNESS: Same summer, perhaps August of last year.

Q What subsequently developed between you and Mr. West?

A A period of time went by. During that period of time I suspect Mr. West interviewed other agencies and talked to other people about marketing the book, and I know the book went through additional drafts and editing procedures

in that period.

The next time I met Mr. West was, I believe, in-- some time in September, when he informed me that he had selected my agency as his agency and that he was in the process of publishing Psycho-Calisthenics.

Q What type of work did you do for Mr. West or for West & Company with respect to Psycho-Calisthenics?

A In respect to Psycho-Calisthenics, we developed an extensive marketing plan, we did extensive media research, we developed a series of ads for testing to sell the book, to market the book.

Q Did you actually place advertisements for the book?

A Yes.

Q In which periodicals did you place ads for the book?

A We ran advertising in Psychology Today, New York Times, Daily News, National Star, I think the Post, the New York Post, and the Village Voice, and there may have been some others that I forget.

Q Did you run an ad in each of those publications once or more than once?

A The New York Times we ran several insertions, the Daily News, one insertion, Psychology Today, two

insertions, a third of the page. The News, as I say, were several insertions, I know the Village Voice was two or three insertions.

Q Are these publications of wide circulation?

A They are national publications.

Q Do you have any idea how much money was spent for advertising with your agency?

A Yes. Mr. West has spent approximately $50,000 with my company in the period we have been working together.

Q During the time that you were placing ads for Mr. West's book, did you happen to notice any other party using the name Psychocalisthenics?

A Yes. Somewhere along the line I became aware of the fact that Arica wasusing the name Psychocalisthenics also.

Q How did you become aware of that?

A Let me see. I think I was informed by Mr. West, as I remember it. I really can't say for sure, but I believe I was informed there was another party using the name and Mr. West told me that.

Q Did you happen to notice any advertisements for Arica's Psychocalesthenics?

A There was some advertising in the Village Voice, small space advertising, for Arica.

Q In your estimation, did the ads that you saw for Arica's Psychocalisthenics approximate the volume of the ads that you had placed?

A Not only were they infinitesimal in scope, perhaps 14 lines, which is very small, and I don't remember them using the word Psychocalisthenics in their advertising with the name Arica.

By the way, I might add that one of the functions of an advertising agency is to become aware of the competitive advertising within a specific field. It was part of my responsibility to know what other mind science companies were doing in marketing.

Q And did you acquaint yourself with this field after you took Mr. West's account?

A After I took Mr. West's account I became much more acquainted with what's happening in the psychology industry, in the mind science industry, as to marketing.

Q Is your firm a party to this action?

A I am not sure how that is defined.

Q Were you joined as a defendant?

A I know I got a piece of paper with my name on it, yes.

Q Does or did that fact influence your testimony today?

A Not a bit.

THE COURT: What is the name of your firm?

THE WITNESS: Jonathan Advertising.

MR. DUBAN: That is all.

CROSS-EXAMINATION

BY MR. KANE:

Q Do you know if there is another advertising agency involved in advertising Duban's Psycho-Calisthenics product?

A What was that question again?

Q Is there another advertising agency involved presently in advertising Mr. Duban's Psycho-Calisthenics?

A You mean Mr. West?

Q I am sorry, Mr. West.

A Yes, there is, Doubleday Advertising.

Q Pardon me?

A Doubleday Advertising is also involved in the marketing.

Q What is the division of responsibility between the two agencies?

A Not terribly clear-cut. We are cross-testing various ads. We work together in some projects and some projects they work alone.

Q When did you place your first advertisement for Mr. West's Psycho-Calisthenics?

gw:mg Gubin - cross

A I believe the first ad ran in November's Psychology Today. November of last year.

Q Did you testify just now that you were informed by someone or something about the use of Psychocalisthenics as a name, by someone other than Mr. West?

A No, I did not.

Q You saw the use of the name in some Arica advertising?

A No, I did not see the name Arica-- I did not see the name Psychocalisthenics in any Arica advertising, to my knowledge.

Q Aside from Mr. West's use of Psycho-Calisthenics, have you ever heard of anybody else using the term?

A Never in the world.

Q You have sold out of your advertising agency Mr. West's book Psycho-Calisthenics, have you not?

A Yes, we were involved in that process.

Q How long did that go on?

A Perhaps-- the initial start-up period from like November through December or January we were involved in receiving phone calls and taking names of people interested in buying the book.

Q I didn't hear that last.

A In the two or three-month period from the time the

book was published, we were involved in taking phone calls for Mr. West and taking the names of people who were involved-- who were interested in buying the book.

Q Your agency had its phone number in some of his ads?

A That is correct.

Q Also you serviced some customers who came to the agency and picked up the book right there?

A Yes, one or two came in off the street.

Q As to the phone numbers, did you take care of them directly from the agency?

A No, we did not. We simply passed on the names to one of the employees who handled the mechanical aspects of snipping the books.

Q You mentioned that Mr. West told you about Arica's Psychocalisthenics?

A Part of our marketing discussions.

Q Did that conversation take place before you placed the first Psycho-Calisthenics ad for Mr. West?

A I don't believe so. I find that hard - I don't remember specifically, but I doubt it.

MR. KANE: No further questions.

MR. DUBAN: I have a couple on redirect.

REDIRECT EXAMINATION

BY MR. DUBAN:

Q Mr.Kane just asked you what happened to the replies.

Do you recall how many replies were received?

A Oh, yes. We received in our agency alone by [illegible] call -- it has nothing to do with the coupon which was filled in and sent directly to Mr. West - - I would say about between 400 and 500 telephone calls that we wrote down the names and addresses of the people, what media they were responding to, and passed all that information on on preprinted forms to Mr. West's people.

Q In your experience in the advertising business, do you think that type of response is a good return on the ads placed?

A I think it was an excellent return.

Q How many impressions of the ads would you say were received and would you explain what that means?

A A consumer impression is the number of times a specific message reaches an individual through a mass media, and I have to sit down and total all the numbers, but it is involved with adding up the total circulation of all the publications we ran and if I were to throw a number at you, I would say 50 million, in that bracket.

MR.DUBAN: I have no further questions.

THE COURT: 50 million?

THE WITNESS: Consumer impressions. That is the circulation of all the ads we ran, all coupled up together.

THE COURT: You don't mean 50 million people were actually aware of the ads?

THE WITNESS: If they happened to turn to the page where the ad ran and they read it, it is possible. I don't really believe that myself, but it is possible.

THE COURT: In other words, 50 million is the potential?

THE WITNESS: Yes, a cume of all the circulation of all the magazines every time we ran it.

RECROSS-EXAMINATION

BY MR. KANE:

Q You said in our view this was a good response to the ad?

A Yes.

Q In your view, did the use of the name Psycho-Calisthenics contribute to that good response?

A Yes, I think the name is a very important name. It is a good name.

Q In the conference with Mr. West about Arica's use of Psychocalisthenics, what did he have to say about Arica's

use?

A We didn't discuss Arica to any great extent because there was nothing to discuss. The fact I was part of a suit or had received legal documentation caused concern on my part as to what my obligations were in terms of the name Psycho-Calisthenics, but there was little or no conversation about the use of Psycho-Calisthenics and Arica.

Q Did Mr. West tell you that he considered that he owned that name, Psycho-Calisthenics?

A As far as I was concerned, as the advertising agency, it was his name, period.

Q Did he ever express to you the view that anybody could use the name?

A It is his name, the name of his book, his course, and it was his name. There was never any question about that

MR. KANE: Thank you.

MR. DUBAN: You may step down.

(Witness excused)

MR. DUBAN: I would like to call Mr. Ossen to the stand.

R I C H A R D O S S E N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBAN:

Q Mr. Ossen, what is your occupation?

A I am employed in the advertising business.

Q And by whom are you employed?

A Doubleday & Company or Doubleday Advertising.

Q Is there any connection with Doubleday Publishers?

A Yes. It is a subsidiary.

Q How long have you been employed by them?

A Since January of this year.

Q Did there come a time when you became acquainted with Steven West?

A Yes.

Q When was that?

A It was in February of 1976.

Q And how did that meeting come about?

A One of our other clients gave Mr. West's name to us as a referral, and I simply called him, and he was interested in meeting us and we set up an appointment.

Q And did you subsequently enter into any business relationship with Mr. West?

A Yes. It is not a formal relationship, certainly not a contractual relationship, certainly during the first few months, but a business relationship, yes.

Q And what has transpired between your agency and Mr. West's company?

A Well, among other things, we have developed some test ads and placed those ads in media for the book Psycho-Calisthenics.

Q In what publications or periodicals have you placed those advertisements?

A Publications that we have used for the book have been the Philadelphia Bulletin, New York Post--all full page ads, by the way--Milwaukee Journal. Denver-Rocky Mountain News, Publishers Weekly, which is a magazine to publishers, and Today's Health.

Q Have you placed those advertisements more than once in those periodicals or just once on a test basis?

A Only once, or a test basis, always using what we call a split, where we split the circulation in at least two parts; one ad going to one part of the circulation, another ad going to another part of the circulation and tabulating the result to see which drew the most response.

Q Have you completed your analysis of the market?

A No, not yet, no. We have got some results but we are still waiting for the results on other ads.

Q Before you can go into any general advertising of the marketing program, I imagine you want to analyze the

results of your test marketing?

A I think Mr. West will certainly want to analyze the results, as would the agency, of course.

Q Is this a normal procedure, to test market a book before you go into general marketing of it?

A I don't think I can answer that with any authority. I can only give you my own opinion which really isn't based on a whole lot of experience. Most of my business experience has been with package goods advertising, nonpublishers.

I would say this: That mail order advertising, any mail order advertising or direct response advertising should always be tested for appeal and for direction to make sure you have the right message. As far as publishing and advertising a book, probably not.

Remember that most book advertising is for purchase in a bookstore. This was a mail order. That is a totally different kind of business.

Q Prior to your entering into a relationship with Mr. West,had you ever heard of the name Psycho-Calisthenics?

A No, I had not.

Q Since your association with him have you ever heard of any other party utilizing the name Psycho-Calisthenics besides Mr. West?

A No, I have no.

Q From your response on the test marketing, are you in a position to state today whether you feel that the name Psycho-Calisthenics has any value to Mr. West in the publication of his book?

A Would you repeat the question?

Q From your -- from the stage of your analysis today, are you in a position tostate whether you feel the name Psycho-Calisthenics has any value to Mr. West in the publication of his book?

A Well, again,you are asking my judgment. I would say there is some value. How much value I really couldn't tell you, but a certain amount of money has been spent behind the book with, for example, Publishers Weekly, which goes to all publishers,it is a trade book, if you will, read by bookstores as well. Of course, in those cities where advertising has appeared and where there has been response to the ad, and the book has been sent to the individual who requested it, there has to be some value. But I couldn't place a value.

MR. DUBAN: Your witness.

MR. KANE: No questions.

MR. DUBAN: You may step down.

(Witness excused)

MR. DUBAN: Steven West will be the next witness.

S T E V E N W E S T, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBAN:

Q Mr. West, are you the sole stockholder of West & Company?

A Yes.

Q Are you responsible for its formation?

A Yes.

Q When did you incorporate West & Company?

A I think it was 1972. I believe -- it might have been 1971.

Q Would you state when you first became interested in the mind science field?

A I always maintained an interest. In college I took various psychology courses. That was in 1959 and 1960 and 1961.

Q What college was it?

A University of Pennsylvania, the Wharton School. The psychology courses were taken in the college portion of the University of Pennsylvania. Subsequent to graduating,

I maintained my interest and took a course at the College of Divine Metaphysics, which is more involved in para-psychology than in psychology.

THE COURT: What?

THE WITNESS: Parapsychology, not earth-related psychology.

A I began to study some techniques, I guess, in 1964 and 1965 and 1966 in the area of scientology and dianetics, and I continued my studies with Silva mind control, both the basic course and the advanced course. I have taken the est program, I have gone to Esalen, I visited Arica once briefly in 1975 during the summer, I have tried to maintain a readership of two or three books a week on the subject and various articles.

Recognizing the need, I felt, for an exchange of data approximately two years ago I formed the American Association of Applied Psycholgy and provided it with the necessary funding and the purpose of this group is to exchange data between people in the human potential and psychology movement.

Q When for the first time did you hear or become familiar with the word Psychocalisthenics?

A I guess it was some time during the fourth or fifth month of 1972. I was groping around to try and find

a descriptive term for mental exercises which was the essence of my concept, and I guess as a marketing person, I began to sit with a piece of paper and played with various name alternatives and names that might mean mind and mental exercises.

The name Psycho-Calisthenics came to me as representing what I intended to do, a course and a book about mind and mental exercises. That is when it first came to me.

Q Are you sure you didn't hear the word somewhere or is this of your own coining?

A To the best of my knowledge I had never heard the word before.

Q At that time had you ever heard of Arica Institute?

A No, I did not.

Q When was the first time that you became aware of Arica Institute?

A 1975 was the first time I actually visited Arica. I believe in early 1975 or late 1974 I may have seen an advertisement or read some literature, but it was very peripheral. I think in 1975 a gentleman from Hudson's Department Store indicated that his sister was involved in it and was pleased with the results from Arica. I really

didn't get to it until the summer of 1975.

Q Prior to 1975, had you ever heard or seen Arica use the term Psychocalisthenics?

A No, I did not.

Q When did you first begin experimenting in or developing the theory or course or session of Psycho-Calisthenics?

A I guess it was somewhat in coordination with the development of the name, possibly a month or two before, Mr. Duban. I guess it was in February or March of 1972 that I began to search out the options that might exist for such a program. At that time I did not call it Psycho-Calisthenics. It was just a mental program that was highly built around alpha brain wave control and alpha mind control.

As I began to play with the name that would represent what I was doing, I guess at that point it became formalized.

The first sessions that I ran again was during the summer of 1972, the first time I actually exposed a group of people to the technology. I was trying to get some feedback as to its validity and would it be efficacious with people.

Q When was that first meeting?

A It was in July of 1972.

Q Where was it held?

A At the Windham Hotel, which is between 5th and 6th Avenue on 58th Street, New York.

Q Why did you choose the Windham Hotel?

A Frankly, I had rented Penthouse No. 1 for the summer. I had a residence in Florida at that time and it was an attractive facility, it was comfortable and it lent itself to that kind of a setting.

Q Did you hold any other sessions or meetings about Psycho-Calisthenics?

A We did it again in August of 1972 and there was a brief session in Miami in December of 1973. But at that session there were just three or four people.

Q You have heard the testimony this morning of Jack Finnell and Janice Henningsen.

They recalled the names of some of the people who were there. Would you agree with that?

A Yes.

Q Do you have any that you would add to it or change it?

A I don't think Marion Fraticelli was listed. She is Al Fraticelli's wife.

Q Other than that, you would agree with their

testimony as to who appeared at those sessions?

A Yes.

Q When did you first conceive of the idea of writing a book entitled Psycho-Calisthenics?

A I guess the thought of writing a book, Mr. Duban, was always in my mind. I was interested in communication at all times.

As far as a book entitled Psycho-Calisthenics, there was a brief discussion of it during that summer of 1972, but it was really peripheral. There was nothing really done about it. Then during the fall of 1972 I began to make some chicken scratch notes as to what might possibly go into a book, and Mrs. West and I went away to Hong Kong in January of 1973, and unfortunately that is a 24-hour flight, and I began to write on that plane and try to put together some introductory chapters and concepts, and when we arrived in Hong Kong, I was very inspired, I guess it was an inspiration by all the travel. I had never been to the Orient before.

We used the facilities at Mr. Law's office to begin to transcribe some notes and to begin to write the book.

I must indicate, however, that it changed in context. There were 25 or 26 drafts over a couple of years'

period. I really wanted to make a good product that would be significant and voluminous amounts of changes and modifications were made over that period of time.

Q Did those manuscripts and drafts ultimately culminate in the book which you published?

A That is correct.

Q Did you have any help in writing this book?

A Yes, sir.

Q Who furnished you with this assistance?

A I solicited the assistance of about 15 or 20 people in different capacities. One was Sheldon Rose, who was one of my original teachers in the Silva mind program. I used him for the human viewpoint. I guess he was actively involved with me from early 1973 in terms of the book and it changed dramatically because of his guidance.

My book would have been very boring if it would have been a Ph.D. dissertation instead of a book. He criticized and I made significant changes.

I also conferred with James Stickler, who is a Ph.D. psychologist and his discipline is Neo-Freudian. He had the more conventional viewpoint and he assisted me.

Throughout the period of time, as the drafts began to flow, I solicited many people's assistance on a different

basis. I asked Mr. Finnell to assist me because he is excellent at proofreading and very knowledgeable in the human potential movement as a student and participant.

I have given drafts to Herman Schneider who is the president of Lake Success Capital Corporation and also a business associate of mine in one of my businesses.

Several other people have seen the drafts from the consumer viewpoint. Tina Stewart, Susan Levin saw a copy of it and I don't recall all the names but we circulated about 15 or 20 copies to try and get explicit comments before we would go to publication.

Q When was that, approximately?

A It started in 1973 and there we were limited to a couple of people helping me, Mr. Finnell and, of course, Janice did some of the typing, and then as it became more firmed up in 1974, I began to become a bit more aggressive in soliciting comments and people were less generous in their comments in 1974. They now realized it wasn't a plaything, that I really was going to publish the book and it was going to be a major part of my future, my career, and they were more explicit in their comments about the book, what it lacked and what it needed.

I also showed it to Mr. Fraticelli, who was highly critical of the book in 1974. He felt it was boring.

He asked me to take certain steps in changing the book, which I took into consideration.

Q When you were contemplating publishing a book under the name Psycho-Calisthenics, did you take any steps to investigate whether that name had in fact been appropriated and used by any other party before?

A Yes. I utilized your law firm to run a trademark search to be sure there would be no confusion such as we are experienced today, and you reported back to me that in fact there was no registration of it and that a registration would be satisfactory and we should pursue it.

And I believe it was in 1974 that we pursued the registration both in New York and in federal court after carefully going over the trademark search and knowing there was no such name on file.

Q In your trademark application both with New York State and with the U. S. Patent Office, what was the date of first use that West & Company reported?

A I think West & Company reported October of 1974 as the first use.

Q How is that consistent with your earlier use of the name?

A When I realized this would become a major project of what I would hope to be significant marketing-

wise, I decided to make West & Company a corporation. There was a letter of assignment between the two companies. I asked my company to search it through. They probably will find it in the next day or two. It is a letter from me to me really, as a practical matter, for legal purposes. I began to have West & Company advance all of funds necessary to make this a major marketing effort.

Q Why did they file the applications with the October 1974 date rather than the earlier date you individually had begun to --

A That was the first use of West & Company and therefore that was the time the assignment was made. They couldn't file for a previous utilization of it.

Q How did you attempt to have the book published?

A I pursued various options, Mr. Duban. One option was to seek out venture capital. I thought this might be a very heavy capital intensive project and therefore at one point I sought out participation of venture capital groups and people to syndicate the investment in the book. That was an option which I pursued.

I also pursued the option of other publishers publishing the book, and we received, you know, general interest and vague interest but nothing that was substantive enough that would make it worthwhile.

And after a lot of reflection on it, I decided that I would fund the project myself,I would decline the offers of venture capital. We had had a few offers. I thought they had too many strings associated with them. And we would create McDonnell-Winchester, which became a division of International Toy Corporation, one of my other companies, and that company would begin to market the book aggressively.

I hired a consultant who is a specialist in the publishing business and we began to undertake what is in fact a self-publishing effort.

Q What is the name of that consultant you hired?

A Philip Rodgers.

Q After the formation of the publishing firm, what did you do next in order to further the publication and sale of the book?

A As a marketing person, I have seen books constantly published that sell five or ten or fifteen thousand copies because of the lack of promotion. So my first major effort was to consider the marketing options available to us, and in those considerations, we began to interview advertising agencies and public relations agencies as well as to consider the channels of distribution that we might utilize to market the book and courses, as well.

Q What type of courses were you contemplating?

A There were several courses that I was contemplating then that we are doing; each is somewhat specialized. There is a basic course in Psycho-Calisthenics, which is cursory, brief, and is intended to last just a few hours, and is pointed at the layman who is inexperienced in mind science so as not toscare him. It is a very complex course.

There is a more complicated course that lasts an entire day and deals in more sophisticated technology.

There is a weekend course also which again is an extension of the one-day course.

We also developed three specialized courses designated to achieve particular problems, or solve particular problems. One is on the stopping of smoking. We think it is a terrible problem on smoking and we are experiencing good success with that.

We have an additional course on weight loss. I endured a 40-pound weight loss myself, so I had some real reality on that.

We have a third specialized course on human sexuality, having to do with creating a more open and loving human being.

We now contemplate more courses but they are in

the research stage.

Q These three courses are presently completed?

A That's correct.

Q And they are being offered?

A We are offering them both in terms of an audio cassette program with an accompanying program learning manual, as we are beginning now to conduct courses throughout the country on smoking and weight loss. We think the country is not quite ready yet for a major sexuality course but we are going to conduct that through the cassette program.

Q When did you embark upon an advertising campaign for the book?

A To the best of my knowledge, the first ad ran on October 26 of 1975, and we ran ads at that time in The New York Times --

Q Who is "we"?

A The company ran ads which were placed through Jonathan Advertising. West & Company placed them through Jonathan Advertising: New York Magazine, New York Times, Village Voice, New York News, New York Post, National Star, Psychology Today. They were all utilized in the fourth quarter of 1975.

THE COURT: What is the National Star?

THE WITNESS: It is a weekly tabloid publication, a sort of common paper pointing to est and common curiosity. It had a million and a half or two million circulation. It is akin to the National Enquirer which you may or may not have seen. At one time it was a scandal sheet. It upgraded itself.

THE COURT: Sold on newsstands?

THE WITNESS: Yes, sir.

Q Do you recall how much money you spent to date advertising the book?

A Including the money spent with Jonathan Advertising, with Doubleday Advertising, and with cooperative advertisements of a substantial nature in conjunction with May, D & F in Denver, Abraham & Straus in New York, Jordan Marsh in Boston, Lit Brothers in Philadelphia, Pizitz in Birmingham, Alabama, Burdine's in Florida, Miami Beach, Florida, Orlando, Florida, Robinson's in Tampa, St. Petersburg and Orlando, Meir & Frank in Portland, Oregon, and there are in addition ten or fifteen full-page ads or half-page ads, the names of the stores I am not familiar with.

The cumulative expenditure has been somewhat in excess of $100,000 to date and I believe that our total impressions are about 120 million impressions.

Q What do you mean by impressions?

A It is the number of people at a maximum who could possibly read an ad. We only express it, however, in terms of full page people. We do not run a two-line ad and count as an impression. It is the number of ads multiplied by the reading audience of that newspaper or magazine.

Q That is the total potential? That doesn't mean 120 million people actually read it?

A Absolutely. The studies indicate that only on a full-page advertisement which has some form of prominence in the newspaper, possibly one out of five will read it, and possibly one out of 20 will remember if it is a very good ad.

THE COURT: Say that again.

THE WITNESS: Possibly one out of five will read it and possibly one out of twenty will remember it if it is a good ad.

Q Is this advertising regional or throughout the country?

A It is varied, Mr. Duban. Certain of the publications are national in scope, like Psychology Today, National Health and Star. Others are regional, many of the newspapers, like the Milwaukee Post or Rocky Mountain News, the Miami Herald.

Q You mentioned the fact that you promoted through

department stores such as Burdine's in Florida and A & S; what was the nature of that promotion?

A It varied, Mr. Duban. In some cases it was an attempt to sell the book by direct response and walk into the store.

In other cases it was an attempt to invite people to attend the course in Psycho-Calisthenics.

Over the course of my travels in the last half year, I guess ten to fifteen thousand people have shown up for the course in Psycho-Calisthenics put on in the restaurants or special events rooms of the various stores.

The marketing position changed from market to market with the emphasis on the book or a course.

Q What other procedures were employed to promote the sale of the book?

A We have mailed out to the public in mailing pieces, approximately two million mailing pieces announcing Psycho-Calisthenics.

Q Where did you get the mailing list from?

A The department stores. This is quite an effective means because it is clearly a one-on-one communication. A person receives a piece and opens it up. Although it is much more expensive than media, the recognition factor is higher. We have experienced very fine success and so

far to date, as best our records can indicate, approximately eight-tenths of one percent of each person receiving this mailing has in fact purchased the book or we would estimate it to be around 16,000 units of sale from that means alone.

Q Have you attempted to promote the sale of this book through any other media?

A Yes. We have utilized public relations as best we can to try and gain the good will of the consumer. I have run a two-hour course in Psycho-Calisthenics. WOR granted me two hours of time on the Barry Farber program which is heard in 25 major market areas with an estimated audience of about 700,000 people.

Although that is questionable based on who is listening at any particular time, and we put on a two-hour course on Psycho-Calisthenics, and we were swamped with requests for information and data, and we disseminated a lot of free books to people who couldn't afford it from that particular program.

Q When was your course given on WOR, on the Barry Farber Show?

A I believe it was February of this year. Previous to that in, I believe December, Mr. Duban, I was on the Barry Farber program for a half hour as agreed.

In February he invited me back because of the

interest in Psycho-Calisthenics, and we aired the program to 25 cities.

In addition to that, I have been on television here in New York, in Washington, Florida, Portland, Denver, Dayton.

Q How many programs were you on here in New York?

A The Richard Rothman program. I have been on it twice. It is an interview talk show.

Q What channel?

A I really don't know. I think it is cable television. New York is rather difficult to get TV time for authors. The other stations were network stations, in areas like Washington, Orlando, Portland, Dayton, Ohio. It is easier to obtain and I have been on the equivalent of the Today Show in those areas, the morning shows or the evening programs.

Q And you yourself personally appear and promote the book?

A That is correct. Actually it is not as much the book as the concept of Psycho-Calisthenics, because there are certain requirements of not being too commercial on these programs. We talk about the book, we talk about the benefits of a mind science program, and I try in those talks to include many other techniques as well as my own

so that we get people intellectually curious about mind science.

We did a count and we estimate that the total viewing audience of all the viewing programs combined was about four and a half million people. Of course, it is questionable as to who has remembered it and who has not but we have made some impact.

What I have tried to do is be on the radio a lot. I have been on approximately 20 or 30 radio programs. I have been on the Bob Grant Show, the Andre Bernard Show, which is the city-owned station, Bob Grant is WMCA. I have been on the WBAB informational program in major stations in Suffolk County twice. I have been on the program in Nassau County, I think it is WLIR, but the name escapes me. I have been on WPTA in Paterson twice.

We tried to get as much communication as we could.

At those times we invite questions from the public on Psycho-Calisthenics and other programs I have been on have been Fisher-at-Large in Cleveland.

I neglected to mention we also ran a major advertisement in Cleveland, took TV time in Cleveland as well.

In addition to the radio and TV and the $100,000 media expenditure,we have attempted now to get the name

across by the production of a television program, and it will be a half hour TV program. We are now syndicating it right now . We would hope it will be aired in about 30 cities in the fall.

Q Did there come a time when you visited the premises of Arica for the purpose of taking a course?

A Yes. It was some time last summer, Mr. Duban. I had seen an advertisement in the Village Voice with the interesting title Psychocalisthenics, and being I was just about completed with the book and I had never heard of it before, I was intellectually curious.

That advertisement didn't hold it out as a trade style but I wanted to see what it was all about.

I went on a Saturday morning and unlike my technology, it seemed to be physically oriented in that it was calisthenics-type exercises designed apparently to stretch the body in different ways, to free up levels of trapped tension.

I found it to be interesting, to be worthwhile, mentally noted it, left, and didn't think too much about it.

Q Do you maintain a business address on Long Island?

A That is correct.

A That's 376 Wyandanch Avenue, North Babylon.

Q Did there come a time when a representative of Arica visited your premises on Long Island?

A Yes.

Q When was that?

A I guess it was approximately July of 1976-- 1975, pardon me.

MR. KANE: I object to this line of inquiry, your Honor. I don't think Mr. West's testimony will be personal knowledge at all. I think it is double hearsay.

THE COURT: From what I have heard so far it doesn't indicate that yet.

Go ahead.

Q At that time that a representative of Arica visited your place of business on Long Island, what were you attempting to do?

A We were then considering the option of a venture capital syndication of the book and we had placed an advertisement in The Wall Street Journal, the Eastern Regional Edition. Several people had inquired about the possibility of participation in that investment and I received a call from my office indicating that there was a Patrick Oliver who had presented himself to our office and asked to receive a copy of the book since he and his wife were on vacation

supposedly on Long Island and wanted to see a copy of it

I said, "That's fine," and we permitted them to have a copy of the book.

Q Did this Patrick Oliver obtain a copy of your book?

A It was a copy of the first couple of chapters, Mr. Duhan. They were in type and set at that time.

Q Did you know Patrick Oliver before that time?

A No.

Q Did you subsequently learn who Patrick Oliver is?

A Yes.

Q Who is he?

A He is associated with Arica. Yes, associated with Arica.

Q Mr. West, did you have printed up material that is used in connection with your promotion of the book?

A Yes.

Q And in connection with distribution through department stores?

A Yes.

Q I show you this brochure and ask you if you are familiar with it.

A Yes.

MR. DUBAN: I would like to offer this into evidence, your Honor.

I will show it to Mr. Kane.

THE COURT: Mark it for identification.

xx (Plaintiff's Exhibit 1 marked for identification)

THE COURT: Any objection, Mr. Kane?

MR. KANE: I would like to hear the testimony. Mr. West purported to give me whatever he was going to use at trial of this type of material. This piece was not included. So I might object on that ground. If it is a current piece, then I won't object.

Is this a current piece?

THE COURT: It has not been identified yet.

Can you tell us what it is?

Q Would you explain what this is?

A This is a mailing piece which is used as a department store insert in charge plates. It is in fact a current piece and is used repetitively by department stores by varying their local impression on the other side here to create their own identity with this mailing piece.

Q Is this similar to theother mailings, as a matter of fact, representative of the one given to Mr. Kane earlier in response to his demand?

A Yes.

Q But the name of the department store might just differ?

A There is a tremendous amount of literature being generated right now. I don't think it is quite accurate. There is a tremendous amount of literature being generated on the subject. A lot of it is outside my control. Some is, some is not. This is a new technique we are utilizing to provide stores with this piece which is in fact inserted with the charge bills that you receive each month. This is now scheduled to be utilized in approximately six million impressions between now and the fall with leading department stores.

Q And this is representative of the material that is going to be disseminated by these department stores?

A Yes, except it is fair to mention there is a constant testing process and it is always updating and changing, phrases being changed. So it is representative but I am sure it will change and has changed in the past.

MR. DUBAN: I would like to offer this into evidence, your Honor.

MR. KANE: No objection.

xx (Plaintiff's Exhibit 1 received in evidence)

Q Mr. West, you furnished Mr. Kane with a great

deal of advertising copy in response to his demand?

A That is correct.

Q Without taking the Court's time to go through every piece of advertising, I am going to show you one and ask you if this is representative of the advertising that you have done and if it is similar or identical to the one that was given to Mr. Kane.

A That's not similar.

THE WITNESS: May I pick the piece out, your Honor?

THE COURT: Yes.

(Pause)

xx (Plaintiff's Exhibit 2 marked for identification)

MR. KANE: It has not been identified. I don't think there will be any question about it.

Q Would you identify this, Mr. West?

A That is an example of a full page advertisement which is running in The Wall Street Journal this month. It is sponsored by Brentano's, which is the third largest bookstore in the United States and is representative of the full page ad we will be running. It has been marked up. There are a few changes on this one as well. I think the changes are an endless process as you try to be current in

your advertising.

Q But this is representative of the advertising which you have done?

A That is correct.

Q In size and in content?

A Yes. The only exception, Mr. Duban, is there are two sizes of full page format. One is the New York Times format size, which is this size. The other is a tabloid size, which is the New York Post size. Only with that exception it is representative.

MR. DUBAN: I would like to offer this into evidence, your Honor.

MR. KANE: No objection.

xx (Plaintiff's Exhibit 2 received in evidence)

THE COURT: Mr. Duban, is this a good time to take a break?

MR. DUBAN: Yes.

THE COURT: I think the reporter needs one.

MR. DUBAN: I do, too. I can barely talk.

(Recess)

BY MR. DUBAN:

Q Mr. West, I show you this book entitled Psycho-Calisthenics and ask you if you recognize it.

A Yes.

MR. DUBAN: I would like this marked for identification.

(Plaintiff's Exhibit 3 marked for identification)

MR. DUBAN: Mr.Kane, would you like to see it?

MR. KANE: If it is the current book, I have no objection.

(Plaintiff's Exhibit 3 received in evidence)

Q Mr. West, is that the book that was the culmination of all of your manuscripts and drafts on Psycho-Calisthenics?

A Yes. There have been a couple of corrections but substantially that is the book.

Q I noticed after the name Psycho-Calisthenics on the front flap of the book is a small "r" in a circle.

How did that happen to get there?

A That was my error. I was of the impression from our discussions that the filing in New York State was sufficient to put an "r" in a circle and I instructed the people to remove it because it was inappropriate. It was my mistake as a layman not knowing any better.

Q Was it your intent to hold it out as having received a registration from the Patent Office?

A No. I thought the registration from New York

was sufficient because we were a New York company, but you advised me that was incorrect.

MRS. KANE: I didn't hear the witness.

THE WITNESS: Do you want me to repeat it?

THE COURT: Mr. Reporter.

(Record read)

Q To date, approximately how many copies of this book have you sold?

A 50,000 approximately, Mr. Duban, but, as you know, in the book business you have a return privilege so that 50,000 are in distribution now and one has to establish a reserve for potentially return books that might be somewhere between 10 and 15%.

Q How is this book being distributed throughout the country?

A It is being sold by mail order, it is being sold by a distributor in the United States, a distributor in Canada, a distributor in England, a distributor in Japan. We are also marketing it through our own sales force as well.

Q In addition to selling the book, have you distributed the book without compensation?

A I think, as I have indicated in the past to you, Mr. Duban, we have a philosophy that anybody who cannot

afford the book can have one for nothing in return for working four hours for us, and we have distributed hundreds and hundreds on that basis to people who come up in the seminars and say, "I really don't have $10, I am unemployed," or "I am a student" and we ask them for an interchange, working four hours for the book.

We try to make it a major point in every lecture we don't want money to be a barrier to getting knowledge to help people.

Q Have you given this book to groups or organizations?

A Yes. We have given it to a lot of the elderly and poverty people. One is the Stein Center here in New York. They heard the Barry Farber program and asked if I would speak in front of several hundred of the elderly people. To retired people, that is, federally-funded project, I believe, $10 is a lot of money. So we donated copies of the book and ran the seminar for them and they were pleased.

Q About how many people would you estimate attended that meeting, the Stein Group?

A Several hundred, Mr. Duban.

Q When was that held?

A Approximately three months ago. I don't know

the exact date.

Q Where?

A Here in New York City. They have a center, the Stein Center, here in New York.

We have also made available copies of the book in the Virgin Islands, in the Watts section of Los Angeles, and we regularly respond to requests if it is a bona fide request from people who would like to have a copy to achieve some useful purpose.

The same thing applies to our course as well. We don't preclude anybody from taking the course because of lack of dollars. Anyone who can't afford the course can work the appropriate number of hours in exchange for attending the course.

Q Since you began your advertising and marketing campaigns, about how many responses to your advertisements for this book have you received?

A Approximately the direct response portion of our sales have been about 20,000, plus or minus 10%. An additional 30,000 approximately has been sold to the trade. We have orders on hand and commitments on hand for approximately 25,000 additional copies, and there are 50,000 additional in print right now beyond the 50,000 sold that are being prepared for distribution now.

Q To the best of your knowledge, is there any other book currently being sold under the title Psychocalisthenics?

A It was our understanding that the Arica group was coming out with a book called Psychocalisthenics. I was told at the American Booksellers Convention in Chicago that this book has been delayed until November and that apparently, if we are reading it properly, the title has been changed from Psychocalisthenics to Arica Psychocalisthenics.

We consulted with the Simon &Schuster people at the show and they could not produce a copy of the book for us to take a look at.

Q So that to the best of your knowledge there is no other book on the market called Psychocalisthenics?

A That is correct.

Q Are there any major distributors of your book?

A Yes. John Day, which is a division of Dun & Bradstreet, is a major distributor.

There is a group in Canada but unfortunately the name escapes me. We just created a relationship with them at the show. They are a dominant distributor in Canada. We created a tentative arrangement in Japan. Mr. Yager is going to be heading that up. I don't have

his corporate name.

And we have now concluded agreements with several of the direct mail people in principle for them to distribute the book as well, which is a different channel of distribution. That does not include distribution of the paperback portion of the book, which we have not finalized as yet.

We received several tentative offers and we decided not go go ahead with that until the fall.

Q In your opinion, do you think that the title or trademark Psycho-Calisthenics was the only reason for the sale of your book or could you have sold your book under another title?

A I think it is a significant title. I would hope the underlying work is sufficiently adequate that it has some merit unto itself, but I think the name is significant. It is a catchy name. I think it has merit. The degree of merit is a tough question to answer, Mr. Duban.

Q Do you think, in your opinion, and from the response that you have been able to study, from your marketing efforts, that the name Psycho-Calisthenics has a meaning to the general public?

A I really do. I wouldn't have answered that question positively three months ago, but the deluge of

advertising and public relations and the acceptance in the trade right now, at the Book Show in Chicago, I was asked for an autograph. I was flattered because I was standing next to Dick Clark, Cab Calloway, and famous people. It has proliferated because of the advertising. It is developing significantly.

Q Is it your opinion that the name Psycho-Calisthenics is associated with West & Company?

A I don't think West & Company. People woudn't know who the owner is per se. They would think it is beneficially myself.

Q West or West & Company?

A Yes, they would associate it with me at this point.

MR. DUBAN: You may inquire.

CROSS-EXAMINATION

BY MR. KANE:

Q At the University of Pennsylvania, did you say you studied pscychology?

A No. I was a major in marketing, Mr. Kane. I took several psychology courses.

Q But your degree was in marketing?

A A B.S. in economics and a major in marketing.

Q The book also credits you with having completed

programs at the College of Divine Metaphysics?

A That is correct.

Q Where is that college?

A That's in Indianapolis. It is a program which you attend in absentia. As I told you previously, they grant a doctorate degree in psychology. I don't hold myself out as Dr. West, because I don't feel that the course merits a Ph.D. I do feel it does merit an inclusion or a mention in someone's reference pattern.

Q Is this what you call a mail order course?

A That would be a definition of it, yes.

Q You didn't attend classes on a campus?

A That is correct.

Q And you describe the whole experience as "not impressive to me"?

A Yes.

Q But it was impressive enough to put in your book jacket?

A As you note in the book jacket, we do mention about fifty different disciplines. In that frame of reference it is worth mentioning.

Q The book jacket describes you as a respected applied psychologist. Some of the advertising I have seen, while it follows this copy, does not call you an applied

psychologist, it doesn't call you a psychologist at all.

Have you discontinued calling yourself a psychologist in this promotion?

A No.

Q Do you know if you are qualified to call yourself a psychologist under New York State law, particularly Section 7601 of the New York State Education law?

A My understanding of that section, although I am not an attorney, Mr. Kane, is that the word "applied" as a qualification is probably acceptable. That is my understanding. I am not an attorney. I believe they have some very difficult rulings on the use of the words "psychoanalyst," "psychologist," "analyst."

To the best of my knowledge, no one has ever questioned the term "applied psychologist," but I don't have a legal opinion on that.

Q This book also credits you with being President of the American Association of Applied Psychology?

A That is correct.

Q How old is that group?

A Approximately two years.

Q Did you found it?

A Yes.

Q How many dues-paying members are there?

A There are a total of 180 members, of which 25 or 30 pay dues. As I indicated, there are two types of membership. There is participating and nonparticipating, and the participating people pay dues on an average of $30 per year.

Q The 1972 meetings that several of these witnesses have testified to this morning, do you agree with their testimony that no fee was charged to those attending the meeting?

A That is correct.

Q And no advertisements were placed to solicit people to attend?

A That is correct.

Q And the only people who attended were friends of yours who you called up?

A There were some other people in attendance but it is substantially correct that by the nature of not advertising and not charging a fee, the only people who could attend would be the people I was acquainted with.

Q And you stated these were casual seminars?

A Our course is an unstructured course and there are no time blocks that we adhere to. It wasn't casual in the sense of unplanned or not purposeful.

Q You testified on direct examination this morning

about the circulation of drafts of your book to different people. Is it not so that the first circulation of drafts of your book took place in 1975?

A I don't think so, Mr. Kane. I went back and tried to check. You see, it is a difficult period as to when something is a book and something is research notes and so forth and so on. In 1973, I don't believe the word circulation would be appropriate. I think I showed it to people who looked over my shoulder when Mrs. West did some typing or I showed it to Mr. Finnell.

In 1974, late, and in 1975, that manuscript was in sufficient form that I thought it was ready for publication and in the truest sense of the word circulate, I gave a fully completed manual to 20 or 25 people and began to solicit full comments. There is an embryology there.

Q What I was taking a look at was a transcript of your deposition at page 50 when you described people who reviewed a draft of your book. I said:

"Q Did you give the drafts to any of these people before 1975?"

And you said:

"A No."

Then on the next page, page 51, I said:

"Q Did you give any of these five people a draft

of your book in 1974?"

And you said:

"A No, to the best of my knowledge, Mr. Kane, there might have been some pieces or swatches of it at the time that might have been given to or gotten taken back, but I don't recall."

A I think that answer is substantially what I am saying right now. Late 1974 or early 1975 the full distribution of the book began. There were swatches and pieces prior to that.

If I didn't communicate that clearly, I am sorry. That is what I intended to say.

Q The trademark search that you ran on Psychocalesthenics provoked this question and answer at your deposition at page 80. I want to read my question and your answer and ask you if this is still your testimony today.

"Q Why did you ask for a search?

"A As a good businessman I felt that since I intended to make it a trade brand, any prudent businessman would do a search for a potential trademark before investing funds in that trademark to avoid any potential conflict that might arise at the conclusion, and I asked Mr. Duban to conduct that search for us. He has in the past conducted a lot of trademark searches for me. When in the

past he has indicated there is someone with a preexisting trademark, we havd declined to go forward with that particular trademark.

"Before owning or claiming a trademark or holding myself out to the public as owning a trademark, as a prudent businessman, I asked Mr. Duban to conduct a search for me."

A Let me modify that so it is not taken out of context, Mr. Kane.

Thenature of a business development develops in stages, as I am sure you are aware: There is a research stage, there is an implementation stage, there is a testing stage and there is a massive, massive infusion sometimes if it is successful. What I meant to say in that deposition is before vast funds were invested and there was a major program on our part, we wanted to go forward and check it. Certainly prior to that we in fact had a trademark. We had a course in Psycho-Calisthenics and I had lots of work on the book. Before we have this sort of data we are having in court today with hundreds of thousands of dollars being spent on advertising, then I thought it would be prudent to have a trademark search.

If I were entertaining a business relationship or venture whose total capital expenditure for the year

might be three or five thousand dollars, I don't think I would retain a law firm for a thousand dollars to make a trademark search.

Q Let me read you a portion of that answer, this sentence:

"Before owning or before claiming a trademark or holding myself out to the public as owning a trademark, as a prudent businessman I asked Mr. Duban to conduct a search."

Is that correct?

A If I may answer your question again, Mr. Kane; there is a difference in owning or holding myself out on a vast project or on a small project. We did in fact hold ourselves out on a small project a couple of years prior to that. When it became apparent it was going to be a major, major involvement, it was at that point we did a trademark search.

If I had a company that had annual aggregate sales of $10,000 a year with the product, I doubt if I would have conducted a trademark search. I would have construed myself to have owned it at that particular time.

When I realized what would be involved was the exchange of several millions of dollars, it was prudent to spend the money and spend the time.

Q When you answered my question last Monday, you said before holding yourself out to the public you would ask Mr. Duban to check it. You didn't say anything about major investment, minor investment.

Why are you making that distinction today?

A Last week I testified I was ill and I have accommodated everyone because of the short time on the trial. I indicated I would do the best I possibly could. I think I responded in approximately eleven thousand words or 80 pages, and if some of those words had minor inaccuracies in them, the terms of definition or interpretation, I am sorry. I didn't intend it that way.

Q How do you know it is eleven thousand words?

A It is 80 pages, about 140 words to a page. It is my opinion I am not testifying.

Q I hand you a certified copy of the application which you filed for your New York State registration, but let me mark it first.

xx (Defendant's Exhibit A marked for identification)

MR. DUBAN: No objection.

xx (Defendant's Exhibit A received in evidence)

Q Is that your signature down there on behalf of West & Company?

A I believe so.

Q Did you swear to the facts recited in this exhibit before a notary public?

A Yes.

Q Do you know who the notary public was?

A No.

Q If I suggested to you it was Michael C. Duban signing down there, does that refresh your recollection?

A Yes. His handwriting has been unclear, but I would say it is.

Q In paragraph 6, the paragraph numbered 6 of this state application, you are requested to describe the services for which the mark is used, and you said,"Development of Mind Ability, the mark will be affixed to all material and literature concerning this program."

Then in 7, it says: "Describe the mode or manner in which the mark is used." And you say, "The mark is affixed to all literature and is used to identify applicant's program."

Was there any literature existing in October of 1974?

A My thought, Mr. Kane, is that the literature we are referring to is probably a draft stage of the book, and this looks like the title page of that draft

stage, the first couple of paragraphs. What in fact was filed secretarially in Mr. Duban's office I am not sure. The literature we were referring to was a section of the book.

Q Did you say something looks like the title page of the book?

A Yes.

Q What?

A This last page here.

Q The last sheet attached to Exhibit A?

A Yes.

Q That is a photocopy of a little slip of paper?

A That is correct.

Q Do you know where that slip of paper came from?

A Probably from my office to Mr. Duban.

Q I don't want you to guess.

A As I indicated, I had to say probably. I am not sure.

MR. KANE: Let me mark as Defendant's Exhibit B a certified copy of the file history of a U. S. Trademark Application, Serial No. 30254, to register the mark Psycho-Calisthenics.

xx (Defendant's Exhibit B marked for identification.)

THE COURT: On this last exhibit I can't read the date it was notarized.

MR. KANE: I can't verify to it either, your Honor. I think it is October, and I think that in the record West has filed as part of the preliminary injunction papers the registration that issued on this application, and I think that shows the filing date.

THE COURT: The cover sheet says it was registered on November 20, 1974. I take it the notarization was some time earlier than that.

MR. KANE: Yes. We may have another copy in our files. We will check during lunch and see if we can clarify that.

THE COURT: Maybe Mr. Duban knows that the date is.

xx (Defendant's Exhibit B received in evidence)

THE WITNESS: It looks like 29.

MR. DUBAN: Some date in October, your Honor. I can't read the date.

THE COURT: I am not sure it is important.

Q I hand you Defendant's Exhibit B. Again I direct your attention to the fourth sheet of paper in this exhibit which is entitled Application for Trademark Registration.

Is that your signature at the bottom of that page?

A Yes, sir.

Q Was this application filed at your direction?

A Yes.

Q The fourth sheet of the application also requires that you identify the goods on which you are using this mark and it comes here about a third of the way down the sheet in a little blank marked 5. It says "The above-identified applicant has adopted and is using the trademark shown in theaccompanying drawings for publications and course material."

Did you select that description?

A I am not sure whether I did or Mr. Duban did.

Q If you didn't, you must have told him what you were using it on?

A That is correct.

Q What did you tell him?

A I don't recall. I am sure it is accurate, however, Mr. Kane.

Q Then again, moving two-thirds of the way down the page, the printed text says: "And five specimens showing the mark as actually used are presented herewith."

Do you know what specimens were presented herewith?

A I really don't. My assumption is that the first couple of chapters of the book or some printed literature

was along with the title page, but I really don't recall.

Q If you will turn to the sixth sheet in this Exhibit B you will find what the Patent Office refers to as an Action. That is a rejection of this application and in the third paragraph, please note it says, "The specimens are not acceptable." It says, "They are in the nature of mere pieces of paper."

Do you recall considering that rejection?

A Vaguely, yes.

Q Did you determine to submit five new specimens in accordance with the request here?

A I don't recall what we decided to do, Mr. Kane. I left it up to Mr. Duban. There was some discussion about refiling under a service mark. I am not an attorney. Or whether the New York filing would be satisfactory or whether we already had common law other than this since 1972. I really don't recall what was determined, to tell you the truth.

Q Do you recall at the time this rejection was received that you took out the specimens that were filed and reviewed them?

A There was some review of the subject, Mr. Kane. I don't recall the exact --

Q Was there any review by you of the specimens which

had been filed?

A No, I don't believe so.

Q Under the Patent Office rules this rejection we have just looked at, which was mailed August 7, 1975, required a response within six months.

You will notice at the bottom of this sheet it says that a proper response to this office action must be received within six months of the date of this action in order to avoid abandonment.

Did you make a decision to abandon this application?

A I don't think we made a conscious decision. It might have been through an error on my part or negligence on my part. But I don't think we made a conscious determination to do so.

Q A week ago when I examined you, you didn't know this was abandoned?

A That is correct.

Q When did you find out?

A This morning when I had a discussion with Mr. Duban about it that it was procedurally abandoned, whatever the proper term might be, and he made that determination because he had intended to oppose your mark and he felt that was the most prudent path.

You recall, Mr.Kane, that our interaction and discussion I believe started last October, well within the six-month period, and I believe Mr. Duban's strategy was this case should be resolved first and that was his decision.

Q But he never told you that?

A He might have. We have a lot of matters together. He is a very efficient guy and we have a lot of matters going. I might have forgotten.

Q As of last Wednesday you must have forgotten?

A Respectfully, there are a lot of things I forget in the day-to-day conducting of my business.

Q Turning to the application itself now which is the fourth sheet in, it recites that "The trademark was first used on October 14, 1974."

Who selected that date?

A I believe I did. I think that was the formal date of the assignment from myself individually to West & Company corporately.

Q That is the assignment I asked you and your counsel to produce and you tell me you are unable to locate.

A As you recall, Mr. Kane, the American Bookseller Show was all weekend, Monday and Tuesday. I arrived home midnight last night. I put in a call to my office to try to

find it. I am sure they will find a copy. It is a simple document and it will be produced if that is feasible.

Q That was last night. Did you say you found the thing?

A No, I didn't say that. I am sorry. I said I called this morning. I have been out of town since the weekend. We had our examination Thursday, last week.

Q It was Wednesday.

A Wednesday. I have been working to find it. I am sure it will be found and it is a rather simple document, a three or four-sentence letter.

MR. KANE: This whole business leads me to note for the record, your Honor, just to settle my stomach for lunch, that we did begin Mr. West's deposition last Wednesday under an earlier adjournment, and he did say he was ill and as a result it was stopped after an hour and forty-five minutes with all agreeing to resume four o'clock Friday and finish it up.

Late Thursday Mr. Duban's office said he was out of town and would be unable to return, and we never finished the deposition.

Questions like this about the assignment were left hanging.

THE COURT: Mr. Duban was in California and

unfortunately his plane couldn't get him back here in time.

Q In selecting that date, did you tell Mr. Duban about your use of Psycho-Calisthenics prior to October,1974?

A I believe so.

Q Did you or didn't you?

A Yes.

Q What did you tell him?

A I believe I recited the facts as they are described here today, that it started as -- Mr. Duban is an acquaintance of mine and we discussed some personal matters related to it.

I discussed with Mr. Duban my original interest in mind science, I discussed the problem I was having in my marriage, the importance of mind science to me personally, and that the original sessions went back to 1972.

Q Did you tell him that you used that word in 1972?

A Yes, I believe so.

Q Did you ask him whether he shouldn't put 1972 into this blank instead of 1974?

A I think we had that discussion. I think the determination was since West & Company was filing , it would be accurate to state it was filed in 1974. I don't think we contemplated this discussion today.

Q What didn't you contemplate?

A This discussion today.

Q When did you hire this Mr. Rodgers?

A Approximately August of 1975.

Q You have three cassette programs that you testified to, is that correct?

A Yes.

Q I want to mark the two your attorney has produced for me. One is entitled "Stop Smoking." We will mark that.

xx (Defendant's Exhibit C marked for identification)

MR. KANE: The other is entitled "Psycho-Calisthenics Permanent Weight Loss," which we will mark Defendant's Exhibit D.

xx (Defendant's Exhibit D marked for identification)

MR. KANE: I would like to offer both of these in evidence.

MR. DUBAN: No objection.

xx (Defendant's Exhibits C and D received in evidence)

Q Is there a third cassette program having to do with sexuality?

A Yes.

Q Does it exist in the same form as these boxes exist?

A Substantially, yes.

Q Why wasn't that given to me?

A I think Mr. Duban made that determination because the word Psycho-Calisthenics did not apply on the box itself and therefore it wasn't within the purview of your request.

Q Why isn't the name Psycho-Calisthenics used on the box of the sexuality tape?

A I think there was a determination that the technology employed went beyond the general scope of Psycho-Calisthenics as we understood it and it might serve to be confusing if we used the term that way.

Q Why doesn't the name Psycho-Calisthenics apply on the smoking tape that we have marked up there?

A That may be an oversight. It is on the tape itself and on the printed book that I believe goes with it.

THE COURT: It is on the back of the box, Mr.Kane.

MR.KANE: That's right. The back of the box I think is selling other tapes. The front label just does not have Psycho-Calisthenics, unlike the weight loss tape which does have the the name Psycho-Calisthenics.

THE COURT: I don't know what your point is. It isn't on the front of the box but appears on the back of the box at least five times.

Q Did you not at your deposition last week tell me

that if Psycho-Calisthenics was used on the smoking tape it might be a misstatement?

A We were not quite sure, as I told you last week. There is a technique called operant. We had a lot of discussion about it and it is possible that the word Psycho-Calisthenics used totally as it applies to the smoking, unlike as it is clearly used with the weight loss program, might be misleading. In other words, if I may modify this for you, Mr. Kane, you have three programs. You have a sexuality program, which is not truly Psycho-Calisthenics. It has more to do with sexuality exercises.

We have a smoking program, which is a hybrid, involving some Psycho-Calisthenics and some operant conditioning techniques.

THE COURT: What was the last?

THE WITNESS: Some operant conditioning. It is a technique of behavior conditioning, behavior modification, in which people are conditioned by reward and punishment to achieve different levels of behavior, different types of behavior than before.

The weight loss progrm is almost completely Psycho-Calisthenics as we interpret it.

So there may be some confusion on the way the box is marked, but it has to do with our own confusion, I guess.

Q There doesn't seem to be any confusion. You said it might be a misstatement to use Psycho-Calisthenics on the smoking box.

Is that still your view?

A If I may repeat,respectfully, I just indicated to you that Psycho-Calisthenics as it relates to smoking is a hybrid program involving both Psycho-Calisthenics and operant conditioning, and therefore it might be considered a misstatement and might not. We don't spend as much time, frankly, sir, considering the name of something as opposed to benefits it can add to the public, and we will reflect on that and eventually that product will be properly marked based on our own judgment.

Q What is going to be the proper marking? Is it going to have Psycho-Calisthenics on it or not?

A As soon as we make that determination, you will be the first one we will inform.

Q In fact, your ads for the tape prominently use Psycho-Calisthenics with not only the weight loss but also the smoking and the sexuality?

A If you will note, Mr. Kane, in looking at the advertisement, you will find the only place that advertisement now appears is in the coupon of the Psycho-Calisthenics book ad, and to the best of my knowledge, I will have to take

a look at it, the word Psycho-Calisthenics is at the top but the individual title of the cassette does not use the word Psycho-Calisthenics except in the weight loss program.

Q During the luncheon recess I will check the advertising.

A If I may also indicate to you, Mr. Kane, these are brand new products and all new products have a certain level of errors and confusion associated with them. I am sure we will have to review that.

THE COURT: May I see those two books, Mr.Ferrar?

(Handed to the Court)

MR. KANE: I have an advertisement which is among the ones produced for me and we will mark this as Defendant's Exhibit E.

xx (Defendant's Exhibit E marked for identification)

MR. KANE: I offer this Defendant's Exhibit E in evidence.

MR. DUBAN: No objection.

xx (Defendant's Exhibit E received in evidence)

Q Down in the lower right-hand corner of that exhibit there is what you call a coupon, I believe, is that right?

A That is correct.

Q Is that the coupon the public is supposed to clip out and return to you?

A Mr. Kane, as I think some of the advertising --

Q I would like you to answer that question.

A May I respond with a preface so it can be significant?

Q No.

THE COURT: Why don't you answer the question first and if you need to explain the answer, go ahead.

The question can be answered yes or no.

A No, if I have to give an answer, because this was a test and it had errors in it. It was the first one run. We decided that this coupon didn't fairly reflect what we wanted to achieve, and yes, it was printed this way,but it was not our intention.In producing hundreds of advertisements occasionally there are misspellings, wrong phone number. This was in that category. This ad, I believe, was either the Village Voice or The National Star.

After we saw how this ad was placed, we realized it was completely confusing. You will note that the word -- there is a description of the cassettes in the body of this ad, Mr. Kane, and upon further research we found that people were confused as to what we really were selling.

We made a determination from that date on that any

future advertisements of the book and the cassettes in conjunction would only allow the cassettes to be carried in the coupon.

I want to indicate to you that there are additional mistakes we have made as far as titling, not titling, and so on.

Q Who did that ad? Was that Doubleday or other agencies?

A I think we produced this in-house ourselves with some assistance from Jonathan Advertising.

Q Down in the coupon, the three different taped cassette programs are each identified in separate little bits?

A Yes.

Q And in each one you link the name Psycho-Calisthenics with them?

A As I have indicated, Mr. Kane, respectfully, this ad was created as a test ad. It actually predates publication of the cassettes. The cassettes were not completed as yet. We were attempting to test the viability of the market area, and I am sure there are inaccuracies not only in the coupon of this ad but in general spelling, grammar, or composition of the ad in general.

Q The inaccuracies I am suggesting to you, Mr. West,

so that there should be no mistake here, is in attempting to sell your smoking program, your sex program, and your weight loss program, you have used the name Psycho-Calisthenics for all three, isn't that true?

A Mr. Kane, since it was our product and our trademark, it was our prerogative how to use it.

Q Of course.

A We,therefore, like all prudent business people, reserved the right to rethink our opinion based on input of new data.

Upon discussing with our consultants, we find there are three categories of our cassettes: One where it should not apply at all, one where it is hybrid, and one where it totally applies.

After we make a determination on that, that is the way our advertisements will be in the future.

Q When did those tapes become available on the market? I know there are different dates for each one.

A Approximately April, Mr. Kane.

Q Of 1976?

A That is correct.

Q I still see in your advertising the prominent use of "R" in a circle. All three journal ads you are producing right now, The New York Post ad from a few weeks ago.

Why is the "R" in a circle still there?

A After Mr. Duban's discussion with me of last Thursday, we have instructed our people to remove that from all future printing and all future literature.

All the items you see in front of you, Mr. Kane, predate that discussion with Mr. Duban.

Q Did it not come to your attention that the use of the "R" in a circle was not permitted until last Thursday?

A Mr. Duban did indicate that once. I think it was the day of the hearing or pretrial hearing with Judge Stewart, and it did come up. I neglected to follow up on it. I didn't fully understand the significance of it at that point. I still felt we had a state registration.

When we left your office on Thursday or Wednesday, Mr Duban reminded me I had better take immediate action on that and I have so indicated that.

Q The advertising expense that you incurred through the Doubleday Agency didn't begin until January of this year, if that early?

A I think it was March.

Q And the advertising expense you incurred through the Jonathan Advertising Agency didn't begin until last fall?

A Yes, I believe it was August of last year.

Q And the first public advertising that you placed

didn't appear until November?

A That's not correct, Mr. Kane. In July of 1975 we ran an ad in The Wall Street Journal, the one which Mr. Oliver responded to and came to our office in Long Island for.

Q And the next was when?

A In October.

Q Do you recall when you received our notice of infringement?

A No, I don't. It was some time in the interim period. I guess it was after you saw our first advertisement, so it must have been in November.

Was it November 13?

Q The letter was dated November 7 and it is attached to some of the papers here.

A Right.

Q And it was since receipt of that letter that you have conducted this massive advertising and promotional campaign, is that not so?

A Mr. Kane, yes. However, as I indicated to you on the phone, the ad schedule was placed well in advance. It was placed in September. We allowed it to continue. All those ads were committed for and placed in the month of September.

Q All these ads you are talking about, The Wall Street Journal --

A All the ads in the fourth quarter of last year. One places an ad on a program basis. Under advice of counsel, I continued to advertise, that is correct.

Q When were you on the Barry Farber Show first?

A Either late November or early December, 1975.

Q All your radio and TV appearances came after our notice of infringement, did they not?

A One would reason if the box was introduced on October 26, and you wrote me on November 7, by definition that would be so.

THE COURT: Mr.Kane, I would like to adjourn for lunch in the next couple of minutes.

Will you pick a good time?

MR. KANE: I am at a good time. I can make use of that adjournment and conclude this quickly.

THE COURT: Do you want to adjourn now?

MR. KANE: Yes.

THE COURT: We will adjourn until two o'clock.

MR. KANE: I would like to talk about how much more plaintiff has so I can have my witnesses ready.

THE COURT: All right.

(Luncheon recess)

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AFTERNOON SESSION

2:10 p.m.

S T E V E N W E S T, resumed:

CROSS-EXAMINATION (continued)

BY MR. KANE:

Q This department store piece that was marked Plaintiff's Exhibit 1, has this been used yet?

A Yes.

Q In the copy on the front of Plaintiff's Exhibit 1 there is a headline "Read How Psycho-Calisthenics Helped Others" and it is followed by some testimonials.

The second one is signed by Jack Finnell, business executive.

A Correct.

Q Is that the very same Jack Finnell that was here this morning?

A Yes. Jack indicated that he could not use the title "Attorney" without seeming like h may be advertising. It is the same Jack Finnell, that is correct.

Q The first testimonial is signed by Jan Douglas, a housewife.

Is this the same Jan Douglas who worked as a secretary for you?

A Yes.

Q This piece which you testified has been used by a department store has a section called "The Power and the Pleasure of Sex Tape Cassette" and its copy includes the sentence, "You will learn techniques in arousal and satisfaction with Psycho-Calisthenics sexual power and pleasure exercises."

A That is correct, Mr. Kane. The date of that piece is the same date as the piece over there. You will note the similar illustrations; therefore, the same errors carry forward to both pieces.

Q As I remember your testimony this morning, a final decision hasn't been made whether you will sell the sex program under the Psycho-Calisthenics name?

A That is correct.

Q If you decide to sell it under the Psycho-Calisthenics name, is this the typical copy that will be employed?

A Vaguely.

THE COURT: Vaguely?

THE WITNESS: It is difficult to say, your Honor, whether it will be exactly that copy or not. Copy is a constant revising sort of thing. It is accurate as to what the contents of the cassette are. It might not be the same copy. It might be modified.

Q At your deposition you indicated that there had

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been no printed public reference to Psycho-Calisthenics in 1974, not the circulation of your draft book?

A That is correct.

Q Is it still true today?

A Yes.

Q And there has been no printed reference to Psycho-Calisthenics during 1973 either?

A That is correct-

Q This morning you testified that you first heard of Arica, the defendant here, at the end of 1974 or early 1975?

A That is correct.

Q And that some time after that you attended an Arica Psychocalisthenics course in New York City?

A That is correct.

Q If I told you that there were no Arica Psychocalisthenics courses in New York City after June of 1975, would that refresh your recollection that it must have been June or earlier that you attended the course?

A It was a warm day at that time. It might have been June, it might have been July, it might have been May It was in that general time period.

Q In reviewing the affidavit which you swore to on December 2, 1975, and submitted in opposition to Arica's

motion for a preliminary injunction, I call your attention to Paragraph 8 which reads in its first sentence:

"During the early part of 1974 your deponent noticed that certain advertisements run by the defendant Arica Institute used the term Psychocalisthenics in a generic sense in certain of said advertisements."

Well, what is the story?

A I think it is a typographical error. It should have been 1975. We didn't have an advertising agency at that time, Mr. Kane.

Q Your testimony now is that this first sentence in Paragraph 8 of your affidavit should have recited something in the early part of 1975 rather than 1974?

A I believe so, yes.

Q In any event, by the summer of 1975, you knew of Arica?

A Correct.

Q And you knew of Arica offering courses under the name Psychocalisthenics?

A That is correct.

Q And with that knowledge you went to your printer and gave final approval to a dust jacket which prominently featured the name and the text of a book that has the name throughout?

A That is correct.

Q And you used "R" in a circle with the name and I take it you did that because you considered Psycho-Calisthenics to be a name which belonged to you?

A That is correct.

Q Why did you not complaint to Arica?

A I believe I indicated to your previously, Mr.Kane, it has been my judgment too much time is spent arguing over what we call the way we help people and not enough time in helping people and I have made my name Psycho-Calisthenics available to other people to use so long as it would be purposeful.

I also noted, by the way, the advertisements that I saw, that it seemed to be used in a descriptive sense. I really didn't want to preclude-- it didn't strike me to be important.

THE COURT: I am not sure I understand you.

Did I understand you to say that you have made the name available to other people to use?

THE WITNESS: That is correct.

THE COURT: How about Arica?

THE WITNESS: I haven't specifically, but in our conversation in your chambers that day, I said I would do so if I was requested. That was part of an amicable settlement

as far as our arrangement.

Various people have come to me with a request to put on Psycho-Calisthenics programs, one for sporting stars, one for old age people, one for underprivileged families, and I have acquiesced to all those requests without compensation.

Q But it is still the purpose of the present suit to obtain an injunction against Arica's further use of Psychocalisthenics, is it not?

A Mr. Kane, speaking as a layman now, if I may, my happiest objective would be that each of us go about our business and help the world a bit and not take up all this time discussing the name.

However, that is the position we have to take based on your request to have a trial.

Q So it is your position you want Arica to stop and you brought witnesses today and you brought me in today and exhibits with the objective of persuading the Court Arica should stop, isn't that so?

A I don't know how to give you a legal answer. It is my intention not to have that to be the fact. The fact that we are here today is you wanted to have a day in court. I regard it as a terrible cost in time and talent. We should be out helping people.

MR. KANE: I should like to move to dismiss the claim and move on the counterclaim.

THE COURT: I don't think we can do that. If that is a formal motion, I will reserve on it.

MR. KANE: Thank you, your Honor.

Q On the jacket of your book and on page 8 of your book you refer to Arica.

Why do you do that?

A There are approximately twenty or thirty significant movements in the country, Mr. Kane, in the human potential movement. I believe Arica is one of those.

Q Did you testify you heard good things about Arica?

A Yes, that is accurate. I have heard some things that are negative,but they are far outweighed by the good things.

Q Is it your position you have taken nothing from Arica for inclusion in your book?

A As I believe I indicated to you previously, there has been no direct attempt at taking anything from the Arica program.

However, one's experience is a function of a lot of things, and I have attended a two-hour program, and I have seen from time to time literature on Arica in the last

year. Consciously nothing has been taken from that program of a substantive nature.

Q At this morning's court session did you testify that you believed there was a written assignment of the Psycho-Calisthenics name from you to your company?

A That is right.

Q It was written?

A That is correct.

Q Now, at your testimony a week ago, did you say you didn't know if it was oral or written?

The question was: "Was there a written assignment?" at page 84.

The answer was: "I don't recall. I have to check and find out."

A I consulted with Sid Lang, who is president of my company, and he recalls such an assignment. We didn't recall where it was physically. We have a rather long, elaborate facility out on Long Island, but he did remember a specific agreement. I had to write the letter to someone else other than myself. He does recall it and he is searching the files. I do) it was written as opposed to oral. We haven't yet located it but we will.

Q Do you have any corrections to make in the testimony you gave in court this morning?

A Not that I can recall, Mr. Kane.

Q Particularly the part about discussing with Mr. Duban before filing these trademark applications the fact that you had used the name in 1972?

A Not that I can recall.

Q The affidavit, which is still before you, the affidavit you submitted in opposition to Arica's preliminary injunction motion, at the top of the page, page 2, the first complete sentence begins:

"In January, 1972, your deponent gave group sessions in Psycho-Calisthenics" and so on.

Is that another typo?

A Yes. That should be July. Unfortunately, these were created in 24 hours under somewhat of a duress.

There is also another error somewhere in this, Mr. Kane, about the date of my divorce. I recall seeing it as I read it again. The year is off by one year somewheres.

Q When was the divorce?

A November of 1973.

Q While the affidavit we have just been talking about does refer to a personal trauma-- it is Paragraph 2 of this affidavit -- it says you have been active in the movement since experiencing a personal traumatic experience relating to your divorce in 1971.

It turns out the divorce was in 1973?

A That is correct.

Q Any other corrections in this record that you have noticed so far?

A That is all I can recall.

MR. KANE: Let us mark as Defendant's Exhibit F what seems to be an advertisement headlined "On December 15, 1976, Psycho-Calisthenics will be the No. 1 best seller."

It is among the advertisements that Mr. Duban turned over to me.

xx (Defendant's Exhibit F marked for identification)

MR. DUBAN: I have no objection.

xx (Defendant's Exhibit F received in evidence)

THE WITNESS: I believe you are missing half of that, Mr. Kane.

Q Was there a companion sheet of paper to this one, Mr. West?

A Yes, Mr. Kane.

Q As I received these materials, they were separate sheets so I didn't know which went with what.

My question is on this sheet. Later if you want to complete this, you may do so.

The right-hand column of the copy says:

"McDonnell-Winchester is the public arm created by Mr. West's multimillion dollar D & B rated group of companies."

Who is this D & B referred to in the ad?

A Financial Management Corporation is the company which holds D & B rating and is the dominant company in the group in terms of net worth.

Q Who is D & B?

A Dun & Bradstreet.

Q And then you have identified a company called Toy Management?

A That is correct.

Q Is that one of your companies?

A That is correct.

Q Are you the sole shareholder?

A Yes, beneficially.

Q What were the sales for the last accounting period on an annual period of this group?

A That is not public information, Mr. Kane, but the D & B figure projects the 1976, $22 million in sales.

Q How about for the last audited report?

A That is not public information. I can't respond to it.

Q Is this advertisement, Defendant's Exhibit F, run

anywhere?

A Yes. That was in Publishers Weekly Magazine. It came out a few days ago.

Q In connection with the sale of your book by department stores, have you conducted courses in the department stores?

A Yes, Mr.Kane.

Q Have all your department store courses been in connection with the sale of your book?

A i think so, to the best of my knowledge, yes. It isn't planned for the future but historically it is true.

Q At page 59 through 60 of your deposition a week ago, I asked you these questions and you gave these answers:

"Q When did you select it?"

The answer:

"A I guess the first selection of it per se was in 1972 and I wasn't sure how permanent that selection would be at that point,but that was the first time the word was used.

"Q What use was made of it?

"A As I indicated previously, we had our first session which was really a mental exercise program and to find the name for that we gave it Psycho-Calisthenics back in 1972. But I want it very clear and indicate that there are other

names that crossed my mind before that, during that, and after that, possibly being a better name.

"Q In July, 1972, was the Windham Hotel session?

"A Yes.

"Q And at that session did you mention the name Psycho-Calisthenics?

"A Yes, we tried to give a handle to what we were all doing there and it was in that context, and we called what we were doing Psycho-Calisthenics, although we didn't think it was in cement, and would forever be that way."

A I will try to be less colorful in my answers because possibly I am not communicating clearly. Whenever a new product is developed, it begins to be commercially marketed. One contemplates many options for a trademark for that product. One starts with what he feels is the best option for that trademark. Quite often he continues with that, quite often he discards that.

As a practical matter, we contemplated many options, we selected the post possible option, and that continued now for four years or approximately four years with the same option.

I merely indicated in my testimony that any trademark, whether it is for a cosmetic, a brassiere, or a mind science service, may vary from time to time as a person finds

an alteration in market position. That is all I meant to indicate.

MR. KANE: I would like to offer the West deposition in two volumes because it was taken on May 20 and then again on June 2 as Exhibits G and H for defendant.

MR. DUBAN: I will object to this only because these are not executed and we have not had a chance to read the copy and to make corrections, if necessary.

I would like to reserve objection to it.

THE COURT: If that is your only objection, I will receive them, Mr. Duban, and reserve to you any corrections you tell us you want to make.

I am not sure Mr. Kane will be required to accept the corrections you propose, but I think you are entitled to indicate the corrections you want to make.

MR. DUBAN: Thank you.

xx (Defendant's Exhibits G and H received in evidence)

THE COURT: I would suppose, Mr. Kane, if you disagree with any of his corrections, the only way to resolve that would be to get Mr. West back and find out what, indeed, he did say, and I am sure we all hope that won't be necessary.

MR. KANE: I think there is enough of a record

developed beyond the deposition that there wouldn't be a dispute.

Your Honor, I have no further questions of Mr. West.

MR. DUBAN: If I may.

REDIRECT EXAMINATION

BY MR. DUBAN:

Q Mr. West, you were asked on cross-examination why you caused a trademark search to be made in the fall of 1974 before proceeding with the publication of your book.

You answered because, as a prudent businessman, you would want to know whether anyone else had filed a registration for said name.

My question to you is whether you were prepared at that date, which I believe was October of 1974, if that search turned up a registration of the name Psycho-Calisthenics for any other party, were you prepared to abandon that name and use another name for it in your book?

A Yes, Mr. Duban. At that time it would not have been impossible to have found another name that would have described what I was doing and I would have abandoned the name at that time if you would have advised me that someone else had a prior registration.

Q Also on cross-examination Mr. Kane pointed out certain errors in your deposition and in your affidavit that

was submitted in December as to dates.

Could you tell us why you gave the wrong date for your divorce? Is there any reason why?

A I honestly feel, Mr. Duban, that in reference to two of the three inconsistencies in the total couple of hundred pages, they were typing errors. One was my own error as far as recalling. But I know when I was divorced. I know it wasn't 1971. It wouldn't be in keeping with the rest of the understanding.

As you recall, we were all rushed that day and wanted to get it done before the weekend. It is unfortunately my error in not proofing it.

Q Is this the only enterprise that you are associated with?

A No, Mr. Duban. I am involved in a number of other companies.

Q How many other companies are you involved in?

A Approximately ten or eleven corporations with which I am associated.

Q And what do these companies do?

A International Toy Corporation manufactures the Princess Christina line of dolls. It owns the Montessori Toy Company.

It also manufactures Houdini magic tricks and is

generally engaged as a manufacturing importer of better-priced toys.

Toy Management Corporation --

MR. KANE: Excuse me. I think this is beyond the scope of redirect. It is a matter of direct.

MR. DUBAN: I would like to show Mr. West's association with other companies and their policy of adopting trademarks and searching, et cetera, and what he has been directly associated with.

MR. KANE: They are all his companies.

THE COURT: I will permit it.

Mr. Duban, it doesn't seem to me it is,strictly speaking, or even loosely speaking, redirect, but I will permit it.

Go ahead.

Q Mr. West, in connection with these other companies, do you assign or do you adopt a trade name for any of the companies?

A Many of them.

Q Is it your practice and custom to clear these names before you adopt them commercially?

A Yes.

Q In the past three years, approximately how many trademark searches have you had made for you?

A I am going to guess it is fifteen, twenty or so.

Q And have you ever had occasion to drop the use of a name or change a name after receiving a trademark search?

A Yes, in about two out of three we have had to abandon the name for a product or the title of a product line because of your advice there was prior registration.

As a matter of fact, when it is close and it is uncertain, you have always advised me it is beneficial not to have any litigation and to drop it and we have done that a number of times.

You may recall with the magic line we had, we had seven searches in a row before we found one that didn't have any interference on the trademark.

MR. DUBAN: I have no further questions, your Honor.

MR. KANE: No questions, your Honor.

THE COURT: All right, Mr. West. Thank you.

(Witness excused)

MR. DUBAN: At this time, your Honor, the plaintiff rests its case.

THE COURT: Do you have some motions, Mr. Kane?

MR. KANE: Yes, to dismiss the complaint, your Honor.

THE COURT: I will reserve on your motion.

I would like to see counsel for a moment in the robing room.

(Pause)

J O S E P H J A C K S O N D O W N I N G, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KANE:

Q Mr. Downing, what is your business?

A I am a physician.

Q Speak up, please.

A I am a physician.

Q And what is your practice?

A Psychiatry. I am a specialist in psychiatry.

Q How long have you been practicing?

A Thirty years.

Q Are you familiar with the defendant in this litigation, Arica Institute, Inc.?

A Yes, I am.

Q When did you first hear of them?

A 1970.

Q And what has been your association with them?

A I was in the original class that studied in Chile in 1970-1971. I was president of Arica Institute of America

from 1971 to 1972, I believe, and again from 1973 to 1975.

Q Would you elaborate a bit on this first experience in Chile and the whole founding of Arica?

A Well, I have been a member of the Esalen Institute in California since 1965. I have been teaching there.

THE COURT: What is the Esalen Institute?

THE WITNESS: It is a retreat center for what is loosely called human growth, that is, for a variety of physical and consciousness enhancing exercises. It is located in San Francisco, California, and in Big Sur, California.

There are several similar centers here in New York, but I can't recall the name of them right off the bat.

A So at that time in 1970, I heard of this teacher in South America, Mr. Oscar Ichazo, who was teaching a coordinated system for personal development and since this was the direction that I had been working for almost ten years at that time, I decided to go and learn what he had to teach.

At that time he was teaching in the Chilean city of Arica, which is the northernmost city in Chile on the Peruvian border.

I and fifty-five other North Americans together with some South Americans studied with him for ten months

in 1970-1971.

At the end of this time we agreed that we wanted to return to the United States and to introduce these teachings as an integrated school here in the United States, and in the fall of 1971, came to New York City.

Q Does this describe adequately the school?

A Yes. That was the beginning.

Q All right.

What was the purpose of Arica?

A The purpose of Arica is to introduce into our contemporary American culture an integrated system of personal development centered at the physical, emotional, mental and spiritual levels with the aim of developing totally integrated, rounded human beings.

MR. KANE: I would like to mark this schedule entitled "Feature Articles on Arica" as Defendant's Exhibit I.

xx (Defendant's Exhibit I marked for identification)

Q Has Arica received coverage in national publications from time to time?

A Yes, sir, as stated here.

Q Have you participated in any interviews with national publications on Arica?

A Yes. I was involved in the Fortune article in May

of 1973.

Q Is that identified on this list, Exhibit I?

A It is Folder No. 5. In the Psychology Today report, which is Folder No. 7, in July of 1973.

Those are the two as far as I recall I have been involved in.

MR. KANE: We have prepared copies of the various articles listed in this table of contents, and I would like to offer them in evidence.

They are publications as listed here along with Exhibit I, perhaps as Defendant's Exhibit J.

MR.DUBAN: I would like to object only because there has been no connection between these exhibits and the case at bar.

THE COURT: That is a pretty good ground. You say "only because."

Do these articles deal with Psychocalisthenics?

MR. KANE: They identify the defendant and its business. They are dated back there in the early 1970's period.

THE COURT: What does the asterisk mean after the No. 7A?

MR. KANE: I think it means 7A down at the bottom is out of chronological order. 7A should have been up where

that asterisk is.

THE COURT: What about the brackets around No.8?

MR. KANE: There is no reason for that. That is the title for that. When you look in Folder 8, that is the title of publication.

THE COURT: Do you know the publication?

MR. KANE: No. Most of the publications are clearly defined. One or two of them are not.

THE COURT: What does Arica/Eureka mean? Perhaps the witness can tell us after the No. 8.

THE WITNESS: I don't know what this No. 8 exhibit is. It is a common error that Arica is misheard as Eureka. What it means here I don't know.

xx (Defendant's Exhibit J marked for identification)

Q Have you ever seen this article before?

A No, I have never seen this before.

THE COURT: What was it published in? Can you tell? Is it something Arica published?

MR. KANE: It has commercial advertisements for other businesses and it comes from a collection of such articles.

THE COURT: What about Majority Report, which is No. 9? Is that a Majority Report of West & Co.?

MR. KANE: It says "Majority Report is a feminist

newspaper serving New York."

Arica reprinted an article appearing therein.

THE COURT: It appeared in what? I see.

What is the purpose of the offer, Mr. Kane?

MR. KANE: The purpose of the offer is to identify in the record Arica's standing in the community as a teaching organization over many years. It will be against that background that we will develop Arica's introduction of Psychocalisthenics into its program.

The point is there was an Arica before there was a Psychocalisthenics.

THE COURT: Have you seen those, Mr. Duban?

MR. DUBAN: I have not, your Honor.

THE COURT: I am not sure this is a good example, Mr. Kane. I am looking at what comes, I take it, from Folder No. 9, which is the article from Majority Report.

I suppose I can take judicial notice of the fact that there is a Saturday Review, Fortune, Harpers, and of their significance in the community.

I am not sure I can do the same with respect to Majority Report. I don't know anything about Majority Report.

MR. KANE: I would be happy to withdraw --

THE COURT: The particular article I suggest is

not particularly helpful.

On the other hand, I take it Mr. Duban does not question the authenticity of this and that it was published in the newspaper that it purportedly was published in at that time, before 1974.

I think, Mr. Duban, I am going to accept this for thatpurpose only, to tell us something about Arica.

Since you have not had a chance to review these papers, I am going to take it subject to your right to make whatever motion you wish to make after you have had a chance to do so.

MR. DUBAN: Thank you, your Honor.

xx (Defendant's Exhibits I and J received in evidence)

THE COURT: Off the record.

(Discussion off the record)

Q Aside from your Arica report, are you addressed as Doctor?

A If you wish.

Q What do your patients call you?

A Jack.

Q Aside from your Arica association, have you carried professional responsibilies in your home district?

Where is your home district?

A I am from Palo Alto, California. I have been an associate clinical professor at the Stanford Medical School. I was the Director of Mental Health for San Mateo, California for many years. I was on the California Governor's Advisory Committee on Mental Health.

Is that the sort of thing you want?

Q Yes.

A I was chairman of the Mental Health Committee of the American Public Health Association and of the Public Health Committee of the American Psychiatric Association.

I can go on for quite a while.

Q That is representative, I take it.

Do you have some familiarity with other human potential movements?

A Yes, I do.

Q Can you name some?

A Well, Gestalt therapy technique. I suppose movement would be strong. I have been associated with that.

THE COURT: I have seen that name. I have seen it in some of the papers in connection with this case.

What does Gestalt mean?

THE WITNESS: It is a German word meaning configuration but not in a static sense like one of these patterns on the ceiling but an evolving situation

pattern that is set in motion by some particular need and leads to the resolution of that need.

I get up in the morning and I am hungry, and I am motivated to get breakfast. So it is breakfast gestalt.

I eat breakfast and I am motivated to get on the commuter train to get on my job.

It is the evolution of needs and satisfactions.

THE COURT: Does it have more than that in it? Is it just a study of what evolves when you have a need or is it a way of trying to help people meet their needs?

THE WITNESS: You are quite right, sir.

THE COURT: I don't know. I am asking.

THE WITNESS: In a therapeutic sense is where those needs get blocked. When a need is blocked, then it is like a record that is stuck in a groove. It just plays over and over and over again.

A great deal of what we do in psychotherapy is try in a sense to get people out of being stuck in that one groove and to assist them to finish that need.

For example, if I didn't feel loved enough by my father as I was growing up, I may go through life repetitively looking for a man who will give me love and continue to act like a little boy looking for love.

At the point at which I can get in contact with

that and experience that little boy's frustration, then I complete that gestalt, I finish that business, and get on to the next business.

So that's what gestalt therapy is.

THE COURT: You are making it sound a lot easier than it is, I am sure, in practice.

THE WITNESS: Sometimes it is surprisingly easy. I have worked in that for ten years, but that has its limits. Therapy always has its limits. I became concerned with how can I help people grow into what they could be, not simply--

THE COURT: That is what gestalt is all about?

THE WITNESS: No, that is what Arica is all about. Arica is about what our potentials are. Gestalt is how to finish your business so you can go on and do the next thing.

Q In your activity in all these fields over the last 30 years, have you ever heard of the name Psychocalisthenics?

A I first heard of that somewhere in the spring of 1973.

Q In what connection?

A Well, I heard that the set of exercises that we have been doing under the name of the Arica gym was being redesignated, renamed Psychocalisthenics, and that we were to use that name title in designating that series of

exercises as we did them.

Q When you talk about "we" you mean within the Arica organization?

A The Arica instructors. I am and have been an Arica instructor.

Q Since that time have you ever heard of any other organization using the name Psychocalisthenics?

A Not until last week when I was notified about this particular action, but at no other time, no.

Q You mentioned Arica gym. Is that one of many different trainings offered by Arica?

A Yes. We have quite a number. It is an integrated series of trainings like a college course, a college dregree course, and that is one of them.

THE COURT: Can I interrupt for a moment?

Mr. Reporter, can you read back the last four or five questions and answers.

(Record read)

Q Do you have any personal knowledge of the use of Psychocalisthenics exercises as taught by Arica outside of the Arica Institute, the Arica houses themselves?

A Not personally, no. I have not heard of it.

Q Are Arica training courses sometimes given at Esalen?

A Yes, either in the form of a weekend or week long or I remember there was one two-week training.

Q Who gives them?

A Designated Arica instructors.

MR. LANE: No more questions.

CROSS-EXAMINATION

BY MR. DUBAN:

Q Doctor, are you presently affiliated with Arica?

A Yes.

Q In what capacity?

A I am a member.

Q A member.

But you hold no officership or trusteeship?

A Not at this time.

Q Youstated that you were president of Arica in the United States from 1971 through 1972 and from 1973 to 1975?

A Yes.

Q While you were president, did Arica sponsor courses in psychocalisthenics at Esalen?

A Not in psychocalisthenics alone. We gave Arica training there, of which psychocalisthenics was one portion.

Q But that was conducted while you were president?

A Yes.

Q Now, what type of arrangement was entered into

with Esalen whereby you allowed them to have the course taught at Esalen?

A We didn't allow them. We would go to Esalen, for example, I would, and other times other people would go there and give the course. Esalen itself did not give the course.

Q So that it was only Arica that was really giving the course?

A Yes.

Q Esalen was not?

A Located at Esalen, yes.

Q You said that you first heard the use of the term Psychocalisthenics in the spring of 1973.

Now, you also stated that it was the Arica-designated title of the Arica gym. Is that the full name, Arica gym, or a shorthand version?

A As far as I know, Arica gym was the full title.

Q Do you know whether Arica Gym was a trade name of Arica?

A I have no idea.

THE COURT: Is it a building?

THE WITNESS: No, no. Excuse me. I will explain. Like we say in college, we have gym this morning, it was a series of exercises called gym .

Q Do you know whether Psychocalisthenics is a registered name of Arica?

A I understand that it is. I personally haven't been involved and I don't know where it stands at this time.

Q Have you ever seen a publication of Arica whereby it sets forth that Psychocalisthenics is the trademark or trade name of Arica?

A I believe I recall seeing such a publication recently.

Q What publication was it?

A I don't recall.

Q You wouldn't be able to find out what that was?

A I can probably find out. Just a moment.

I believe, without being sure, that this is a recent publication on the Nine Systems Work.

Q When Arica changed the name of Arica gym to Psychocalisthenics, was there any change in the procedure or method or instruction given?

A There have been several revisions of the exercises. I believe there was one change at that time, but again I am not certain about it.

Q Would you say it was substantively the same?

A Yes.

Q Do you read Psychology Today Magazine?

A Not regularly.

Q Do you have a private practice at this time?

A Yes, sir.

Q Did you have a private practice while you were president of Arica?

A Yes sir.

Q You also mentioned the fact that you spent some time in Chile?

A Yes, sir.

Q Did you have a private practice in Chile at that time?

A No, not while I was in Chile.

Q But you had one prior to going to Chile?

A Yes.

Q Are any of the patients that you see or treat members of Arica?

A A few of them.

Q Does Arica refer patients to you?

A No.

Q They do not. You have never had a patient referred to you?

A By Arica, you mean?

Q Yes.

A Well, members of Arica have suggested that their

friends come see me.

Does that constitute a referral by Arica? I don't know.

Q How many instances would you guess have been cases where members of Arica have suggested or recommended that some of their friends see you?

A At a sheer guess, maybe five or ten.

Q Do you presently receive any compensation from Arica?

A No.

THE COURT: I am sorry. I guess I thought I understood the question.

What was the question to which the answer was "At a guess, maybe five or ten."

(Record read)

Q Doctor, does the phrase "The open path" mean anything to you?

A Yes.

Q What does that mean to you?

A This was a new series of exercises which was brought out by Arica, I believe three years ago. I am not certain about the date.

Q And is this the trade name or trademark of those series of courses?

A I don't know whether it was trademarked or not.

Q Do the words "hypernostic mediation stop" mean anything to you?

A No.

Q It doesn't have any significance in the Arica movement or in the Arica courses?

A Not that I know of.

MR. DUBAN: Thank you.

I have no further questions.

MR. KANE: Thank you, Doctor.

(Witness excused)

S T E V E N A R T H U R S T R O U D, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KANE:

Q When were you first associated with Arica?

A I was first associated with it in 1970. I went to Chile to the same training Dr. Downing mentioned in April of 1970.

Q And following the Chile training, did you maintain an association with Arica?

A I maintained an association. I came back to the United States. I am one of the original three incorporators

of the corporation.

Q You are one of the original three incorporators of Arica, Inc., the defendant in this suit?

A Yes.

Q Have you been associated with the defendant ever since?

A Yes.

Q After the Chile training,was there a training in the United States?

A Sure. There have been many trainings.

Q Was there a first one, though?

A Yes, there was a first one.

THE COURT: Mr. Kane, I have an arraignment which will take two or three minutes.

Can we interrupt?

MR. KANE: We certainly can. This is going to be an extensive witness, your Honor.

THE COURT: Let's do it now before you get started. This will only be two or three minutes.

(Pause)

BY MR. KANE:

Q After the first Arica training in Chile in 1970, was there a first training in the States?

A Yes. The first public training or first

internal Arica training?

Q First internal training.

A The first internal training occurred in September of that year.

Q What year was that?

A 1971.

Q And did you participate in it?

A I did participate in it in Bayville, Long Island.

Q And what was the purpose of that training?

A The purpose of that training was to prepare the Arica group for giving our first public training in the United States.

We had synthesized our ten-month training and were going to present a three-month training to the public. So it was a training to get us ready to do that.

Q When was this first public training given?

A I believe it was October of 1971.

Q And did you participate in that?

A I did participate in that.

Q As what?

A I had an administrative capacity and I was one of the trainers in the program,and I had some supervisory control over the other trainers.

Q And what was the nature of this program in terms

of how long it lasted, what it covered?

A This program was three months long, it consisted of Psychocalisthenics for one hour every morning.

Q Let us be clear on the record.

Were you calling it Psychocalisthenics at that time?

A No. It was the same exercises. We were calling it gym at that time.

Q Carry on in the nature of that program.

A We did the gym every morning for one hour, we would do other movement exercises, some things we call eurhythms for approximately two hours a day mixed up with other physical exercises. We would do meditations for one or two hours a day and personality work. This includes an analysis of personality types and group interaction.

Group interaction is doing things like reductions where we would sit face to face and insult each other back and forth until after a while it doesn't become possible to insult you any more. The words lose what we call their charge and you become comfortable in most verbal environments as well as it results in taking an honest look at yourself.

We would have lectures on types of reasoning,

styles of reasoning, ways of thinking, certain ceremonial work, and other work of a more mystical nature, such as exercises we call traspaso. It is an exercise in which people make an essential recognition of each other. It involves looking in each other's eyes, repeating certain repetitive phrases such as "We are one." That is basically what that exercise is.

There's a large number of exercises we do in that regard. Sometimes it is one person facing one person, it could be a group of nine, it could be ten or twelve groups of nine. We did all these at different parts of the training but they are basically variations of the same thing.

Q How many hours per day was this training conducted, this first New York public training?

A Nine hours per day.

Q How many days a week?

A Five days per week and four or five hours on one more day per week.

Q And how many weeks did it go on?

A It was three months.

Q And how did you solicit students for this first New York public training?

A We advertised, we opened with a full page ad in

The New York Times and ran the same ad in the Village Voice. It was called "The Mosquito that bites the Iron Ball."

MR. KANE: That will be available tomorrow.

Q And when was this, again, the end of 1971, spring of 1972, what was the date?

A October 1971. October, November, December.

Q And how many students were enrolled in this first three-month Arica course?

A I am not sure of the precise number, but it was right around 80, 76, 83, somewhere in there.

Q Did they pay a fee or tuition for this course?

A Yes, they did, $3000 each.

Q After that first New York training, I would like you to tell in your own words the type of training Arica has given over the years from early 1970 on until the present?

A The training I just described was called the three-month training. It was later discontinued. We no longer give the three-month training. It was synthesized again. The work was made more concise and we do in its replacement what we call a 40-day training. 40-day training consists of Psychocalisthenics, which is Psychocalisthenics now that we are in the 40-day training. We called it Psychocalisthenics in the 40-day training.

MR. KANE: I think I can clarify this.

Q The 40-day training is a training that goes on for 40 days, is that true?

A Yes.

Q And it includes many different Arica exercises and dev. s?

A It certainly does.

Q And one of them is now referred to as Psycho-calisthenics?

A Yes. As well we have the work of the nine systems which Dr. Downing mentioned. This is a work where we break our body apart system by system, the nervous system, the digestive system, the musculoskeletal system, and we study those internally in ourselves, both theory and diagrams of what they are. We do meditations on them, we have what we call the psychic expression in there that goes with it.

Musculoskeletal system in our psychology determines how we relate to space. If I had some problem here in my muscular system, I would have some problem in the room adjusting or bump into walls or whatever my particular style was.

But this is a long work, roughly two, four, seven hours per day, including three hours of written work and four

hours of class work on the nine systems, one hour of Psychocalisthenics, some meditations for approximately two hours per day. Ceremonial work which is done at home. We give them the materials and things to meditate on.

THE COURT: I take it the people who are taking the course, if that is the right way to describe it, they pay a fee?

THE WITNESS: Yes. This fee varies sometimes.

THE COURT: I don't care what it is, but they do pay a fee?

THE WITNESS: Sure.

THE COURT: I take it that in your capacity, you said you did administrative work, you were a supervisor, and you also are a teacher?

THE WITNESS: Yes.

THE COURT: What I am concerned about is do you get paid or do you volunteer your services?

THE WITNESS: No. I get paid. I am on salary.

THE COURT: Where does the money come from to pay you?

THE WITNESS: We are nonprofit, so we have two ways we get income. One is from tuitions for these various programs we do and another is donations. Between those we manage to scrape up my salary.

Q You have listed a dozen or so different Arica programs.

Are they all elements of the 40-day training?

A Those are all elements of the 40-day training.

Q Besides the 40-day training, are there other trainings that Arica has?

A Sure. Let me give you just a survey of our set trainings, our formal trainings we have.

We have done hundreds outside of this that we designed. We design them for prisons, for rehabilitation workers, for elementary school systems, for all kinds, but the ones we have are of a set format of the long trainings, the 40-day training: We have an advance training, which is a three-week training.

Again, that would consist of Psychocalisthenics--this would be the only common feature, the same as the 40-day. We have meditations, but different meditations from the 40-day. And instead of working with the nine systems, which is, let's say, how we take information into our body, we work with the nine domains, which is how we move in the world, how we project our energy out.

This works with theatre, with the group processing which we call Karma cleaning, our physical movements, with repetitions, repetitive phrases we say over and over again.

Q And this is all part of a program you call advance training?

A Advance training, yes.

Q So we have the 40-day training and we have advance training.

A We have a 28-day program called the alpha heat. It is a 28-day training and it is a training specifically in how to generate heat in your solar plexus. It comes from the Tibetan traditions. They do-- their initiation ceremony for someone who has completed it, although not us, they put one in an icy mountain stream at night and soak sheets in the water and see how many they can dry out between sunset and sunrise.

We don't have such a checking system but essentially we are doing the same training they do there.

Q Besides these multiple day programs, do you have shorter programs, weekend programs?

A Yes. Do you want to hear about the rest of the longer programs first?

THE COURT: Mr. Kane, this is really quite interesting; indeed, it is fascinating. I am not sure what it has to do with this lawsuit. I would like to listen to this lawsuit.

Q An element in each different type of training Arica

gives is Psychocalisthenics. It is the only element that appears in each one of their trainings.

MR. KANE: I am into this area now, your Honor, because I am mindful of the clock and I am trying to introduce the Court to Arica generally, and close at four, which I understand will be the closing time, and then tomorrow I will be specifically on Psychocalisthenics the whole day.

THE COURT: All right.

Q The longer programs, would you please finish them up?

A We have two other three-month training courses, one called the "Opening of the Rainbow Eye" and one called the"Cutting of the Adamantine Pyramid" known in the vernacular as the diamond training.

THE COURT: The Opening -- what was the first one?

THE WITNESS: The Opening of the Rainbow Eye.

THE COURT: What was the second one?

THE WITNESS: Cutting of the Adamantine Pyramid, which we know as the diamond training. It is just a way of referring to it because we can't go around saying "cutting of the adamantine pyramid" all the time.

The Opening of the Rainbow Eye is so that your consciousness works in the full spectrum which is available

to it. Most people are limited. They deal only with their sentimental life plus perhaps their rules of conduct and their work, but their social aspects, intellectual aspects, spiritual aspects, hierarchal aspects go beyond what most people do. So it is to open up the consciousness to the full spectrum of its possibilities.

The Cutting of the Adamantine Pyramid is a training to solidify that consciousness, to cement it in a level of self-recognition, self-understanding, where you don't lose that understanding of that.

On the shorter courses we do weekends, we do the Open Path weekend you mentioned, which is a set weekend. It consists of calisthenics, the dissatisfactions, whatever your dissatisfactions were, catharsis, public responsibility, where everybody cheers and shouts for you while you confess your desire to change.

Q These are elements in a weekend program.

A These are elements in the Open Path weekend programs. We do other weekend programs. Generally what they will consist of is some of our interpersonal work, some of our meditation, some of our movements, and one hour of Psychocalisthenics.

Q Are there shorter than weekend programs?

A Yes.

Q What are they?

A We have done a three-hour course, which was specifically designed to jack up people's energy level and leave them feeling enormously good in three hours, and it was just a straight "feel good" training. People would come in for three hours, would do our exercises that would raise the energy level and they would leave feeling good.

We do the two-hour lecture demonstrations which must have been what Mr. West was coming to. We don't have two-hour calisthenics exercises. We give an assortment of the different trainings that we do, the different exercises that we do, we will do a few exercises from Psychocalisthenics, one small piece of a meditation, some things like that to give people a kind of quick introduction to our various trainings.

We have Psychocalisthenics which is taught both as a continuing-- you learn it in the first week and then come back as often as you want and it is taught now on the West Coast as a five-day course, where people come and learn Psychocalisthenics for five days and then they do it for another five days and that is the end of that course.

Q Something about your geographical spread. You had this first training in New York, but since that time have 40-day trainings been given in other locations around

the country?

A New York, Boston, Philadelphia, Washington, Atlanta, Georgia, Miami, Puerto Rico, Gainesville, Florida, Chicago, Detroit, Milwaukee, Boulder, Colorado, Denver, Colorado, Vancouver, San Francisco, Santa Cruz, Fresno, Los Angeles, San Diego, Honolulu, Maui, London, Frankfort and Copenhagen.

Q A 40-day training in each of these cities?

A I am sorry. We are going to do a 40-day training in Copenhagen. We have done one in each of the other, several in each of the others.

Q Do you have a physical office in cities other than New York?

A Sure. All the places I have mentioned.

Q What do you call these places?

A We called them houses at one point. They are called associations now.

Q Arica Houses?

A Arica Houses.

Q Did these houses begin the Open Path weekend training and the shorter two-hour, three-hour training?

A Yes, they did.

THE COURT: You named about 30 or 40 cities?

THE WITNESS: Yes.

THE COURT: You have offices in each of those?

THE WITNESS: We don't have offices in each of those cities at this point. We did have offices in each of those cities at one point. It got a little bit over-extended so we reorganized and we now have offices in about twenty cities.

Q Has your position been by and large with the New York house?

A No. I am vice president of Arica Institute and I am on the board and I have been in the central headquarters since the beginning.

MR. KANE: I would like to mark this poster as Defendant's Exhibit K.

xx (Defendant's Exhibit K marked for identification)

THE COURT: Was your question whether his headquarters has been essentially in New York?

MR. KANE: It was.

THE WITNESS: The headquarters has been in New York.

Q Your personal place has been in New York City?

A Yes, since Arica Institute was formed until the present moment.

Q As part of your duties, do you have occasion to approve literature being used by the other Arica houses in

the other cities?

A Yes.

Q Let me hand you this exhibit that has been marked Defendant's Exhibit K for identification.

Do you recognize that piece?

A Yes, I do.

Q What was your association with that?

A This was the San Francisco teaching house course in Psychocalisthenics. This was a poster which was used on the buses of San Francisco.

Q How do you know it is San Francisco?

A It says 580 Market Street, but also because we approve all advertising in New York and they send it in in advance, and they sent it in in advance, and that is who sent it in.

Q Can you date it approximately?

A 1974, the late part of the year.

Q Let us turn to this now.

A I have seen hundreds of these, by the way.

Q For the 40-day training, advance training, and these others you have mentioned, is a roll kept? Are registration records maintained? Do students enroll when they sign up?

A Yes, each student when they register for a 40-day

training, signs an enrollment agreement. One comes to New York, one stays locally, one gets filed, as well as if they sign our medical questionnaire and both of those are submitted.

Q Over the years since the first 40-day training in 1972, how many students have enrolled for the Arica 40-day training?

A We have records on 4000. There has been more than that because sometimes people are not totally good about sending lists in. We are dealing with a large administration. We have records for 4000 graduates.

Q And for the advance training that you mentioned?

A 2000.

Q And for the various Open Path weekends and shorter programs?

A This is going to be an estimate. I would say, being conservative, at least 50,000 people. We don't enrollment agreements on all people who come to a Wednesday night class or a two-hour class or something like that. But that's based on an average of 30 to 50 people down every Wednesday night over a space of several years in 30 locations.

MR. KANE: Off the record?

(Discussion off the record)

THE COURT: All right, ladies and gentlemen, see

you at ten o'clock tomorrow morning.

Tomorrow I can go all day. I can go to 5:30, a quarter to six.

You have one witness who will be here Monday?

MR.KANE: That's right.

MR. DUBAN: Monday I can only stay until about noon. I have to catch a plane late Monday afternoon.

THE COURT: Your one witness, can we do that?

MR. KANE: I think so.

THE COURT: Do you anticipate any rebuttal?

MR. DUBAN: I really do not,your Honor. At this point, I don't think so.

THE COURT: I am not trying to commit you at this point. Then perhaps we can finish Monday morning before you have to leave for your plane.

MR. DUBAN: All right.

THE COURT: All right, ten o'clock tomorrow morning.

(Adjournment to 10:00 a.m., June 10, 1976)

West & Co., Inc.

vs 75 Civ. 5771

Arica Institute, Inc.

New York, New York
June 10, 1976 - 10:20 a.m.

(Resumed.)

S T E V E N A R T H U R S T R O U D,

resumed the stand, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. KANE (Continued):

Q Mr. Stroud, do you recognize you are still under oath from yesterday?

A Yes, I do.

Q In your testimony yesterday you explained for the Court the different trainings which Arica offered. You meant the 40-day training, the advance training and others and you also said that a part of each of them was Psychocalisthenics exercises.

A Yes.

Q Can you estimate how many students came through the Arica training in the last six months of '73 and were exposed to Psychocalisthenics exercises?

A I would say of the 15,000 to 16,000 in the

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short class, 700 in the 40-day training and 700 in the advanced.

Q I ask you for the last six months of '73 because that was the first period when the name Psychocalisthenics was being applied.

What had the Psychocalisthenics activity been called before June of '73?

A I don't know what you mean.

Q June '74 how many students do you estimate came through Arica training with their Psychocalisthenics exercises?

A 30,000 in the small classes, 1,500 in the 40-day training and 900 to 1,100 in the advanced.

Q Did you establish a list or a computerized record of the students that have gone through Arica training?

A We have at various times. It doesn't have everybody on the list. As of early this year, it had 50,000 names on it.

Q In June of '73, when the decision was made to call what had been Arica gym to call it Psychocalisthenics, how was that word demonstrated to the various Arica training houses?

A We had at that time a publication called The

Arica Chronicle and this was how we sent our instructions and news around and we sent it in that.

Q We have marked an exhibit here for identification as Defendant's Exhibit M.

Can you identify this Defendant's Exhibit M?

A Yes, I can. I recognize it. I worked on it.

Q And what is it?

A It is the Arica Chronicle in which we announce the change.

Q Would you read the sentence announcing the change?

A Under the heading "Psychocalisthenics," "The gym has been revised and renamed Psychocalisthenics. Enclosed is a copy for the house. The Psychocalisthenics are to be used in all the Arica programs instead of the old gym including the open path."

Q When was this Arica Chronicle you have just read from distributed?

A June 8, 1973.

Q Subsequent to that date, did you find public notice being taken of your name Psychocalisthenics?

A Yes, we certainly did.

MR. KANE: Let me move the admission of that Defendant's Exhibit M.

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MR. DUBAN: I have no objection.

(Defendant's Exhibit M received in evidence.)

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Q I hand you an exhibit that has been premarked Defendant's Exhibit L.

Can you identify in general terms the contents of this exhibit?

A Sure. They are newspaper clippings and stories that appeared, articles in various publications, on Arica or on programs we gave in different areas of the country, things like that.

Q I direct your attention to the first page in that exhibit.

Can you identify that group?

A Honolulu Advertiser. Yes, it is a Honolulu paper.

Q Date?

A Wednesday, July 18, 1973.

Q In the left-hand column of text we have underlined the word "Psychocalisthenics."

How did a Honolulu paper come to be mentioning Psychocalisthenics in July of '73?

A Well, they were describing a program we gave and programs we were giving and Psychocalisthenics was

in the program. Actually Hawaii got it out before the Chronicle got out. We have a very good grapevine.

Q Did you have a facility in Honolulu that was giving training in the summer of '73?

A Yes, we did. We had the Hawaii house and the Maui house. We had two facilities.

Q Turning to page 3 in this Exhibit L, can you identify that publication and its date?

A Guide to Aspen, and it is September -- this date is very hard to read on mine.

Q It is September, 1973, the original shows. I refer you to the interior page of this Guide to Aspen and the column entitled, "Arica Mind, Emotion and Movement."

Do you find a reference to Psychocalisthenics on that page?

A Yes, about two-thirds down in the right-hand column.

THE COURT: Mr. Kane, I am afraid I am going to have to interrupt.

(Pause.)

THE COURT: All right, Mr. Kane.

BY MR. KANE:

Q I want to return to Defendant's Exhibit L, which is this collection of newspaper clippings referring

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to Psychocalisthenics over the years. We were at page 3 of this exhibit, and page 3 is a publication for September of 1973 and in an interior page entitled "Arica, The Mind, Emotion and Movement," with reference to Psychocalisthenics. Was Psychocalisthenics training being given in Aspen in September of 1973?

A In Aspen and Boulder.

Q Now turning to page 6 --

THE COURT: By Arica?

THE WITNESS: By Arica, yes.

Q Turning to page 6, there is a publication here from Gainesville, Georgia.

Do you see a date in the upper right-hand corner?

A May, 1974.

Q And at the top of the second column of this page 6 do you see a reference to Psychocalisthenics?

A Yes.

Q Again, do you notice Psychocalisthenics being followed by a parenthetical phrase -- what is stated in the parenthetical phrase?

A "Physical exercises, coordinating movement and breathing, methods of relaxation."

Q Is this a story about Arica that is in this Gainesville paper?

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A Yes, it is about the programs done by the Gainesville teaching house.

Q And turning to page 9, from what place is this publication and what is its date at page 9 of Exhibit L?

A It is from San Diego, California, Wednesday, September 18, 1974.

Q And at the second sheet in this publication do you see a reference to Psychocalisthenics?

A Yes.

Q Is that the Arica Psychocalisthenics?

A Yes, it is.

Q How do you know that?

A It says the Arica Gym Psychocalisthenics and we have a house in San Diego called the San Diego Teaching House which was teaching a regular program class there.

THE COURT: What page?

THE WITNESS: Page 9.

MR. KANE: Page 9, the interior page.

Q Does that text at page 9 go on to explain Psychocalisthenics?

A "Psychocalisthenics is an easily learned 20-minute exercise series which develops flexibility, grace and balance."

Q Turning to page 10, what is the date and